Supreme Court, U.S.
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No. 03- -

IN THE

Supreme Court of the United States

LAURA JEAN McFALL,

Petitioner,

v.

CHRISTOPHER WADE WARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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June 17, 2004

QUESTIONS PRESENTED

1. What is the proper test for State compliance with a federally funded mandate, given the conflict between

Georgia's Supreme Court finding its statute does not do major damage to a substantial federal interest even though the trial court's undisturbed findings show Georgia "completely failed" to comply with federal regulations, and

this Court and U.S. courts of appeals requiring full compliance with federal statutes and regulations?

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2. What does the federal mandate that States ensure their child support guidelines result in appropriate awards require, given the conflict between

Georgia's Supreme Court finding its formula based only on obligor gross income and number of children was appropriate although the trial court found Georgia had "*never* shown any economic basis for its guidelines" and Georgia has defied HHS's mandate to revise its formula to limit deviations, and

Washington's Court of Appeals finding guidelines must reflect need and ability to pay and D.C.'s Court of Appeals finding a formula based only on obligor gross income and number of children is inherently inconsistent with need and ability to pay?

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3. Does federal agency approval insulate a federally funded State plan from judicial review for compliance with the agency's regulations, given the conflict between

Georgia's Supreme Court relying solely on HHS approval of its State plan to reverse the trial court's declaratory ruling that its guidelines are invalid for failure to comply with HHS regulations, and

this Court, U.S. courts of appeals and State appellate courts reviewing HHS-approved State plans and U.S. courts of appeals requiring agencies to enforce their regulations?

PARTIES TO THE STATE PROCEEDINGS

This case names all parties to the State proceedings.

Pursuant to O.C.G.A. § 9-4-7(c) (2004), Georgia's Attorney General was served all pleadings questioning the constitutionality of a Georgia law. The State did not intervene or participate.

28 U.S.C. § 2403(b) (2004) requires the Court to certify to Georgia's Attorney General that this case questions a Georgia law.

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LOWER COURT RULINGS

McFall v. Ward, No. 02-CV-2287N (Superior Ct. Rockdale Co., Ga., Feb. 10, 2003) (temporary order) (1a); (Feb. 10, 2003) (certificate of immediate review) (11a); (Feb. 17, 2003) (amended temporary order) (12a).

Ward v. McFall, No. S03A1365 (Ga. Sup. Ct., Mar. 27, 2003) (granting appeal) (14a); (Jun. 5, 2003) (granting extension of time) (16a); ___ Ga. ___ (Mar. 1, 2004) (reversing trial court) (17a); (Mar. 19, 2004) (denying rehearing or reconsideration) (23a).

JURISDICTION

Georgia's Supreme Court entered the decision to be reviewed March 1, 2004, and denied rehearing March 19, 2004.

28 U.S.C. § 2403(b) requires the Court to certify to Georgia's Attorney General that this case questions a Georgia law.

The Court has jurisdiction under 28 U.S.C. § 1257(a) (2004).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

U.S. CONST., ART. VI, CL. 2 (24a); 42 U.S.C. § 667 (2004) (25a); 45 C.F.R. § 302.56 (2004) (26a); O.C.G.A. §19-6-15 (2002) (28a).

STATEMENT OF THE CASE

On September 25, 2002, Petitioner brought this action against Respondent in Superior Court, Rockdale County, Georgia to reduce her child support payments and modify visitation with their children. They had divorced in Georgia in 1993. Respondent has custody of both children, and Petitioner pays support. Her support payments were modified in 1999. She moved to Illinois and had a third child, who lives with her and whom she supports. Experiencing financial difficulty, she filed this action.

Georgia has enacted guidelines establishing a rebuttable presumption for child support awards, O.C.G.A. § 19-6-15, to qualify for federal funds under Title IV-D of the Social Security Act. 42 U.S.C. §§ 651 & 667 (2004). Its guideline formula calculates Petitioner's presumptive award as a constant percentage of her gross income based only on the number of children covered by the award (30a). She earns $1,733 and Respondent earns $2,400 per month (2a). She provides the children's health insurance and incurs travel costs for visitation (2a). The guideline formula requires her to pay 23-28% of her gross income ($389-485 per month) as support, and does not adjust for her third child, health insurance and visitation costs, or for Respondent's income. Georgia's statute provides no criteria to choose a specific percentage in the range, and only allows the court to deviate from the range if Petitioner proves by a preponderance of the evidence that special circumstances make the guideline amount excessive. It provides no criteria to determine if the presumptive award is excessive or for how to deviate.

Pending trial, Petitioner sought temporary reduction in support and a declaration that the guideline formula was invalid for non-compliance with federal requirements (1a). On February 10 and 17, 2003, the trial court entered temporary orders reducing her support and declaring Georgia's guidelines invalid under the Supremacy Clause (1a & 12a). The trial court held (5a-10a):

> The Supremacy Clause of the U.S. Constitution limits the power of the government of the State of Georgia when it participates in federally funded programs. It provides that "this Constitution, and the Laws of the United States made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const., art. VI, cl. 2....For the reasons set forth below, this Court concludes that Georgia's child support guidelines fail to comply with the federal mandate requiring the state to adopt and periodically revise the guidelines in line with current economic data....
>
> The evidence before this Court is clear and uncontroverted that the State of Georgia has not complied

> with federal requirements in setting and/or revising its child support guidelines. It has not considered economic data on the cost of raising children nor analyzed case data in reviewing the guidelines as contemplated by 45 C.F.R. § 302.56(e) and (h). Georgia's failure to comply with the federal mandate makes the application of the state's child support guidelines inconsistent with federal law under the Supremacy Clause of the U.S. Constitution, which this Court is bound to uphold.
>
> Until such time as the General Assembly brings O.C.G.A. § 19-6-15 into compliance with the federal mandate pursuant to which it was adopted, this Court stays the application of Georgia's child support guidelines....

The trial court issued a certificate of immediate review (11a), and Respondent's appeal was granted March 27, 2003 (14a).

On March 1, 2004, Georgia's Supreme Court reversed the trial court, holding as follows (17a-22a):

> Christopher Ward appeals from an order declaring OCGA § 19-6-15(b) unconstitutional. We reverse....
>
> In a temporary order, the trial court...addressed the constitutionality of the guidelines, found that OCGA § 19-6-15(b) did not satisfy certain mandates of 45 CFR § 302.56, and declared OCGA § 19-6-15 invalid by virtue of the Supremacy Clause....
>
> Georgia participates in the federal Aid to Families with Dependent Children program....As part of an interlocking set of initiatives and statutes, and in order to qualify for federal funds, Georgia's child support program must comport with requirements set forth in Title IV, Part D of the Social Security Act....Under 42 U.S.C.A. § 667, as part of its "state plan," Georgia must establish guidelines for child support award amounts. These guidelines are found in OCGA § 19-6-15. The guidelines "shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support

award amounts." 42 U.S.C.A. § 667(a). Administrative interpretation of this Congressional requirement has been codified at 45 CFR § 302.56. Subsection (h)...states:

> As part of the review of a State's guidelines...a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from the guidelines.

The trial court found that Georgia had completely failed to abide by 45 CFR § 302.56(h), and therefore held the State's child support guidelines were invalid....

When discussing whether a state statute may stand under the Supremacy Clause, the Supreme Court...declared:

> Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."...Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'"...and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility,"...or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"...

Gade v. National Solid Waste Mgmt. Assn., 505 U.S. 88, 98...(1992).

There is no Congressional statement of pre-emption, nor is this an area in which Congress left no room for states to act; on the contrary, Congress clearly contemplated, even mandated, state enactment of guidelines. Similarly, there is no question of a conflict concerning compliance with both

federal and state regulations; Congress did not set child support guidelines. Only state guidelines exist. Thus, the question of pre-emption in this instance revolves around the issue of whether the child support guidelines, and the method by which they are reviewed, are an obstacle to Congressional goals.

There is a strong presumption *against* pre-emption in domestic relations matters, as it is traditionally an area of state regulation. *Egelhoff v. Egelhoff*, 532 U.S. 141, 156-157...(2001). The United States Supreme Court has stated:

> We have consistently recognized that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."..."On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted."...Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests."

Rose v. Rose, 481 U.S. 619, 625...(1987).

Here, the federal interest is in obtaining child support orders to enforce the obligations of non-custodial parents. *See* 42 U.S.C.A. § 651. If Georgia has not reviewed its guidelines in the exact manner stated in 45 CFR § 302.56(h), it does not "do major damage" to that federal interest. As the trial court found, Georgia's Commission on Child Support has prepared reports which conclude that the guidelines produce appropriate child support amounts, as Congress required in 42 U.S.C.A. § 667(a). The question of whether the Commission's conclusion is inadequate is presented by the associated administrative regulation, 45 CFR § 302.56(h).

> But this regulation is not the only administrative decision involved....Under 42 U.S.C.A. §609(a)(8), the United States Secretary of Health and Human Services is to reduce a state's grant if the state is not in compliance with Part D, but the Secretary has discretion to judge whether a state has "substantially compl[ied]" with Part D, and to disregard technical noncompliance with it. It is undisputed that the Secretary has approved and certified Georgia's plan and amendments under 42 U.S.C.A. §§ 602 (2004) and 652(a)(3), and has taken no action to reduce Georgia's grant. In such circumstances, courts typically defer to the "executive department's construction of a statutory scheme it is entrusted to administer."...As the responsible federal executive agency has determined that Georgia's guidelines are in conformity with the federal statutory scheme, we will defer to that determination.
>
> Accordingly, we find that the guidelines do not frustrate the stated Congressional purpose, and that the statute is not unconstitutional under the Supremacy Clause.

On March 11, 2004, Petitioner sought rehearing or reconsideration. Both were denied March 19, 2004.

REASONS TO GRANT THIS PETITION

IMPORTANCE OF THIS CASE

In this case, Georgia's Supreme Court held that the State could accept federal funds and disregard federal terms and conditions, but that adversely affected individuals have no judicial redress if the federal oversight agency does not object. Its decision directly conflicts with decisions of this Court, U.S. courts of appeals and State appellate courts. First, by employing preemption analysis, its decision conflicts with decisions of this Court and U.S. courts of appeals requiring States to comply fully with federally funded mandates. Second, its decision creates a split of authority between State appellate courts over whether the federal mandate that State guidelines set appropriate awards requires them to reflect need and ability to pay and whether a guideline formula based only on obligor gross income and number of children is consistent with

need and ability to pay. This presents an important question of federal law that has not been, but should be, settled by this Court. Third, its decision conflicts with decisions of this Court, U.S. courts of appeals and State appellate courts holding that federal agency approval does not insulate a federally funded State plan from judicial review for compliance with federal regulations.

Georgia has since 1975 accepted federal funds to enforce child support and establish paternity. However, its legislature and federally mandated child support commissions have since 1984 disregarded Congress's intent, and the regulations of the U.S. Department of Health & Human Services [hereinafter HHS], that its child support guidelines be designed to result in presumptive awards reflecting need and ability to pay. In this case, after the trial court declared Georgia's guidelines invalid because they "completely failed" to comply with federal requirements, its Supreme Court, in reversing the trial court, ignored and misconstrued well-settled precedent to hide behind HHS's failure to enforce its own regulations as grounds for denying judicial review of Georgia's guidelines.

Congress, in 42 U.S.C. § 667 (2004), and HHS, in 45 C.F.R. § 302.56, intended that State child support guidelines result in awards reflecting need and ability to pay. To be effective in setting appropriate awards, therefore, a guideline must yield outcomes consistent with need and ability to pay in most cases.

This goal requires guidelines to be based on economic data and case outcomes over the range of typical circumstances of divorcing and divorced parents and their children and be sufficiently sophisticated to limit the need to deviate to achieve fair awards. HHS thus requires that States analyze economic data on the cost of raising children and case data on the application of, and deviations from, their guidelines, and revise them "to ensure that deviations...are limited." 45 C.F.R. § 302.56(h) (2004).

Here, Georgia's guideline formula did not account for Petitioner's third child, health insurance or visitation costs, or Respondent's income. The trial court's undisturbed findings show Georgia did not follow HHS regulations for ensuring its guidelines yield appropriate awards. The report of its most recent child

support commission reveals that Georgia does not intend to limit deviations as directed by HHS. From Petitioner's and her third child's perspective, this is not "technical noncompliance" as asserted by Georgia's Supreme Court (21a), but instead presents a "monumental obstacle" to an award reflecting need and ability to pay. *See Fitzgerald v. Fitzgerald*, 566 A.2d 719, 729-32 (D.C. 1989). Georgia's failure to follow HHS regulations has thus produced a guideline too crude to achieve Congress's goal to improve the equity of child support awards.

Regardless of legal theory, Georgia's guidelines daily work injustice in the lives of millions of individuals. Georgia's failure to ensure its guidelines result in appropriate child support awards causes irreparable harm to divorced parents who pay child support and their subsequent children, like Petitioner's third child, whose interests are ignored by the guideline formula, which treats them as "children of a lesser god." *Gallaher v. Elam*, 2002 Tenn. App. LEXIS 94, *reversed*, ___ Tenn. ___, 104 S.W.3d 455 (2003). Last year, the Court denied certiorari when Georgia's Supreme Court reversed a trial court that held its guidelines abridge constitutional guarantees of due process, equal protection and family privacy. *See Georgia Department of Human Resources v. Sweat*, 276 Ga. 627, 580 S.E.2d 206 (2003), *cert. denied*, ___ U.S. ___, 124 S.Ct. 432 (2003). If this court of last resort does not grant certiorari in this case, then Georgia's child support obligors and their subsequent children will have no means of judicial redress.

The volume of challenges to State child support guidelines across the United States suggests the existence of a serious problem. *See* Appendix for Example Cases Challenging State Guidelines (89a). This is particularly true given that most divorcing or divorced parents can scarcely afford the costs of a trial, let alone an appeal. HHS's reluctance or inability to enforce Congress's will, or its own regulations, also suggests the need for a judicial remedy. This case presents an ideal set of facts and a sufficiently developed record before the trial court and the State's Supreme Court to form the basis for a decision by this Court. It also presents important questions of federalism ripe for review by this Court.

The Court should thus grant this petition.

ISSUES TO BE SETTLED BY THE COURT

1. By employing preemption analysis, Georgia's Supreme Court created a conflict with decisions of this Court and U.S. courts of appeals requiring States to comply fully with federally funded mandates.

By employing preemption analysis to assess Georgia's compliance with a federally funded mandate, its Supreme Court created a conflict with decisions of this Court and U.S. courts of appeals requiring States to comply fully with federally funded mandates. Because Georgia voluntarily participates in Title IV-D, its Supreme Court erred by asking whether its guidelines do major damage to a substantial federal interest, and should instead have assessed whether they comply fully with federal requirements.

Though the Tenth Amendment limits federal authority to preempt the family law field, *see, e.g., Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001); *Rose v. Rose*, 481 U.S. 619, 625 (1987); *see also United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995), Congress has broad spending power authority to enlist State participation in federally funded family law programs. *See, e.g., Youakim v. Miller*, 425 U.S. 231 (1976); *Hagans v. Lavine*, 415 U.S. 528 (1974); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *California Department of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968).

Georgia's Supreme Court employed the wrong test. This case involves cooperative federalism, whereby Congress provides funds to States agreeing to exercise their reserved powers as directed by Congress and HHS. *See, e.g., Youakim*, 425 U.S. 231; *Hagans*, 415 U.S. 528; *Carleson*, 406 U.S. 598; *Townsend*, 404 U.S. 282; *Java*, 402 U.S. 121; *Rosado*, 397 U.S. 397; *King*, 392 U.S. 309; *Massachusetts v. Mellon*, 262 U.S. 447, 479-480 (1923). The proper test in this case is whether Georgia's guidelines comply fully with 42 U.S.C. § 667 and 45 C.F.R. § 302.56.

The Eighth Circuit Court of Appeals has summarized key decisions of this Court and U.S. courts of appeals establishing that

preemption analysis is the wrong test and that States must fully comply with federally funded mandates:

> The directors [of Child Support Enforcement] first argue that the district court erred in holding that the provisions of [Missouri's statute] and the division's policy and practice are preempted under the supremacy clause. The directors argue that preemption is not appropriate...because there is: (1) no congressional intent to preempt state law; (2) no actual conflict between the state law and federal regulations; and (3) the policies and practices of the division and [Missouri's statute] do not cause any major damage to any clear and substantial federal interest.
>
> [Petitioners]. . .respond that although the state statute is preempted by federal law. . .such an analysis is not even necessary, when, as here, the state statute and policy do not conform with federal program regulations.
>
> In *Townsend v. Swank*, 404 U.S. 282 (1971), the Supreme Court held that Illinois' definition of a "dependent child" was inconsistent with the federal definition required by the AFDC program. The Court, without engaging in a preemption analysis, simply concluded that the Illinois statute and regulations conflicted with the federal statute and therefore were invalid under the supremacy clause.
>
> Similarly, in *King v. Smith*, 392 U.S. 309 (1968), the Court invalidated a state regulation which defined "parent" in a manner inconsistent with the definition set forth in the Social Security Act. Again, the Court did not employ a preemption analysis, but instead simply reasoned:
>
> > There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.

In *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987), we considered whether a regulation of [HHS] requiring that applications for public assistance for AFDC benefits include siblings living in the same household conflicted with the state's authority over child support obligations. Although this court stated that the issue did "not present the 'classic' preemption question of whether a congressional enactment precludes state regulation of the same subject," we went on to utilize a preemption analysis to determine whether a conflict between federal and state law existed, stating:

> "The question here relates to the conditions that Congress has placed on state programs supported by federal funds." The State voluntarily accepts the conditions imposed by Congress and, once it chooses to do so, the supremacy clause obliges it to comply with federal AFDC requirements.

Similarly, the District of Columbia Circuit stated in *Planned Parenthood Federation v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983):

> It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish eligibility standards for federal assistance programs that conflict with the existing federal statutory or regulatory scheme.

The court rejected the argument made in that case that a regulation issued by [HHS], requiring Title X grantees to comply with prevailing state law as to parental notification or consent, merely clarified the fact that the state law was not preempted by federal law. The court explained:

> This case presents no direct conflict between two bodies of law, one state and one federal. We have only a *voluntary* federal funding program with specific eligibility requirements. The law on this issue is clear: even if Congress permits the States to impose additional rules as to eligibility for federal funding, those rules must be consistent with the

> federal standards or else be held invalid under the Supremacy Clause.
>
> The directors and amici argue that...the [foregoing] decisions are factually distinguishable because those decisions dealt with state limitations on the eligibility of individuals to receive benefits, and Missouri's policy of attempting to collect the entire amount of AFDC benefits paid out does not restrict the availability of individuals to receive child support enforcement services. We reject this distinction. These decisions do not rest on the fact that the state regulation in issue concerns eligibility requirements. Rather, it is the conflict between the state and federal regulation which supports the courts' invalidation of the state regulation.
>
> Here, Missouri participates in a federal program and receives federal funds. As a condition of receiving such funds, Missouri must comply with program requirements and cannot refuse to comply with federal regulations governing the program by simply stating that the monies it seeks to recover are governed by state law....
>
> We are convinced that...[the Missouri statute] and the Director's policy are inconsistent with federal regulations governing the AFDC program. Accordingly, [the Missouri statute] violates the supremacy clause and is invalid.

Jackson v. Rapps, 947 F.2d 332, 335-7 (8th Cir. 1991) (some citations and footnotes omitted).

None of the decisions relied on by Georgia's Supreme Court involved Congress's spending power. In *Egelhoff*, 532 U.S. 141, the Court held that ERISA preempted a Washington statute governing the effect of divorce on life insurance and pensions. In *Gade*, 505 U.S. 88, the Court held that OSHA regulations preempted Illinois hazardous waste regulations. In *Rose*, 481 U.S. 619, the Court applied preemption analysis to find Tennessee could award child support out of veteran disability benefits.

Unlike *Egelhoff*, *Gade* and *Rose*, this case presents no conflict between federal and State objectives. By accepting federal funds, Georgia agreed to comply with the federal mandate established by Congress and HHS. As the Eighth Circuit held in *Jackson*, Georgia was obliged to comply fully.

2. Georgia's Supreme Court created a split of authority over whether Congress's mandate that guidelines set appropriate awards requires them to reflect need and ability to pay and whether a formula based only on obligor gross income and number of children is consistent with need and ability to pay.

By upholding its guideline formula, Georgia's Supreme Court created a split of authority over whether Congress's mandate that State guidelines result in appropriate awards requires them to reflect need and ability to pay and whether a guideline formula based only on obligor gross income and number of children is consistent with need and ability to pay. Georgia's Supreme Court decided an important question of federal law that has not been, but should be, settled by this Court. Its decision moved federal jurisprudence in the wrong direction, creating "monumental obstacles" to awards that reflect need and ability to pay.

Washington's Court of Appeals has held that Congress intended appropriate child support awards to reflect need and ability to pay, finding the legislative history:

> reflects that Congress was...concerned that...consideration must be given both to the needs of the child and the ability of the absent parent to pay....

In re Marriage of Gilbert, 88 Wash. App. 362, 374, 945 P.2d 238, 243 (1997). D.C.'s Court of Appeals, in invalidating its original guidelines on the ground that a judicial rules committee exceeded its authority by adopting rules that changed underlying substantive law, held that guidelines based only on obligor gross income and number of children are inherently inconsistent with need and ability to pay. *Fitzgerald*, 566 A.2d at 729-32. Read together, these decisions directly conflict with Georgia's ruling that its

guideline formula based only on obligor gross income and number of children satisfies the federal mandate to set appropriate awards.

Congress enacted Title IV-D of the Social Security Act to provide participating States with funds to enforce child support and establish paternity. *See* Social Services Amendments of 1974, Pub. L. No. 93-647, sec. 101 *et seq.*, 88 Stat. 2337, 2351 (1975) (codified as amended at 42 U.S.C. § 651 *et seq.*). In 1984, Congress amended Title IV-D to require participating States to study their child support systems, "giving particular attention to...the establishment of appropriate objective standards for support," and to establish advisory child support guidelines. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, sec. 1, 15 & 18, 98 Stat. 1305, 1320-1 (1984) (codified as amended at 42 U.S.C. § 667). In 1988, Congress amended Title IV-D to require States to make their guidelines a rebuttable presumption in all child support cases. *See* Family Support Act of 1988, Pub. L. No. 100-485, tit. I, sec. 103(a) & (b), 102 Stat. 2343, 2346 (1988) (codified as amended at 42 U.S.C. § 667). Federal law now directs States to "establish guidelines for child support award amounts" and to "review [them] at least once every 4 years to ensure that their application results in the determination of appropriate child support amounts." 42 U.S.C. § 667(a) (2004).

The Senate Report on the 1984 amendments reveals Congress's intent that guidelines reflect need and ability to pay:

> *Present law.*—Federal law...does not...address itself to the adequacy or reasonableness of support....
>
> *Committee amendment.*—[T]here remains a continuing problem...to provide reasonable funds for the needs of the child in the light of the absent parent's ability to pay....[T]he existence of guidelines tends to assure that there is reasonable consideration given both to the needs of the child and the ability of the absent parent to pay....The development of such guidelines will necessarily require States to devote some study to what is appropriate and to review what other States have done....The Committee recognizes that the development of a court order is a complex determination requiring the consideration of many

> aspects of the individual circumstances of the parties involved....It is the view of the Committee...that the very existence of a set of guidelines in each State will tend to improve the reasonableness and equity with which support orders are established.

S. Rep. No. 98-387, *reprinted in* 1984 U.S.C.C.A.N. 2397, 2436.

Congress authorized HHS to "establish such standards for State programs for...child support...as [it] determines to be necessary to assure such programs will be effective." 42 U.S.C § 652(a)(1) (2004). The agency's regulations require States to review their guidelines based on economic data and case outcomes and revise them to limit deviations. 45 C.F.R. § 302.56(e) & (h) (2004).

Georgia has from the outset failed to comply with federal terms and conditions for child support guidelines, and HHS has likewise failed to enforce them. Though Congress required States to adopt advisory guidelines by 1987, Georgia did not enact them until 1989. *See* 1989 Ga. Laws 861 (codified as amended at O.C.G.A. § 19-6-15). Though Congress required States to make their guidelines rebuttable presumptions by 1989, Georgia waited until 1994, after it received a notice of noncompliance from HHS. *See* 1994 Ga. Laws 1728 (codified as amended at O.C.G.A. § 19-6-15); *see also* Charles F. Fenton, III, *Domestic Relations*, 11 GA. ST. U. L. REV. 171, 174 & n.37 (1994).

Georgia has never recognized Congress's intent that child support guidelines reflect need and ability to pay. In this case, Georgia's Supreme Court, quoting 42 U.S.C. § 651 (2004), asserted that "the federal interest is in obtaining child support orders to enforce the obligations of non-custodial parents." (21a) Its opinion never mentions need and ability to pay. The 1991 report of Georgia's first child support commission indicates that it too failed to consider need and ability to pay in recommending Georgia's originally enacted guidelines (34a):

> The purposes of child support guidelines and the purposes sought to be served by the guidelines recommended to the Legislature by the Commission and largely enacted by the Legislature are: (a)...[T]o increase

> the amount of child support being ordered; (b) To make awards more consistent...; and (c) To improve the efficiency of court processes by enhancing ease of settlement and ease of adjudication.

Last year, in reversing a trial court ruling that its guideline statute violated constitutional guarantees of due process, equal protection and family privacy, Georgia's Supreme Court, in applying a rational basis test, held:

> Clearly, the Guidelines are designed to further the important and highly reasonable objective of ensuring that adequate support is provided for Georgia's children whose parents have divorced or separated

Sweat, 276 Ga. at 629, 580 S.E.2d at 210. The *Sweat* court only referred to need and ability to pay in addressing family privacy, where it noted that child support settlements are subject to judicial review "to consider whether such support is sufficient based on the children's needs and the parent's ability to pay." *Id.* at 631.

While Georgia's guidelines were advisory only, its Supreme Court held that they did not alter its substantive law requiring consideration of need and ability to pay. *See Willingham v. Willingham*, 261 Ga. 674, 675, 410 S.E.2d 98, 99 (1991); *Walker v. Walker*, 260 Ga. 442, 443, 396 S.E.2d 235, 236 (1990). However, Georgia's Supreme Court has never held that its guideline formula is consistent with need and ability to pay, and instead leaves that objective to deviations from the formula. *See, e.g., Eleazer v. Eleazer*, ___ Ga. ___, 2004 Ga. LEXIS 339 (May 3, 2004); *Betty v. Betty*, 274 Ga. 194, 552 S.E.2d 846 (2001); *Hoodenpyl v. Reason*, 268 Ga. 10, 11, 485 S.E.2d 750, 751 (1997); *Ehlers v. Ehlers*, 264 Ga. 668, 449 S.E.2d 840 (1994).

In contrast, the D.C. Court of Appeals has held that a guideline formula based only on obligor gross income and number of children, leaving all other factors to deviations from the formula, is inherently inconsistent with need and ability to pay:

> [T]he trial court has the duty of "balancing the many factors surrounding both the pecuniary situation of the [non-

custodial parent] and the reasonable needs of the minor children."...

The two specific relevant factors are the non-custodial parent's ability to pay based on net income and the child's needs based on his or her accustomed standard of living.

Amici WLDF [Women's Legal Defense Fund] argues that the Guideline retains the broad principles of... need and ability to pay....However, there are several real differences between the Guideline and the case law.

First, the ability to pay under the Guideline is calculated using gross income. Amici WLDF argues that the Guideline percentages allow for tax and other expenses and that the Child Support Guideline Committee would have used a higher number had net income been used; however, there is no record support for this assertion. Furthermore, amici NCCR [National Council for Children's Rights] points out that the Guideline numbers do not specify how much tax....

Second, the Guideline determines a child's needs solely on the parents' income....The Child Support Guideline Committee concedes that the Guideline marks a definite departure from. . .basing child support on the needs of the child and the ability of the parents to pay, but asserts that "such a change was necessary to correct the current problems."

Third, the presumptive nature of the Guideline places some limitation on the breadth of discretion previously exercised by the trial court....[T]he question remains regarding what level of proof is required to overcome the presumption.

By its own terms, the Guideline is not binding....

However, the Guideline places certain inherent and explicit restrictions on the discretion of the hearing officer and trial judge....[A] party opposing application of the

Guideline has the burden of showing that he or she has an "exceptional" case or one involving "some circumstances that would yield patently unfair results" which justifies deviation from application of the Guideline....

Since the Guideline is presumptively fair, any party opposing its application would have a higher burden of proof than it might have without the Guideline....[T]he numeric formulae make it difficult to ascertain what assumptions are being made. Amici NCCR argues that it is impossible to tell the basis on which the Guideline is presumptively applied. The Guideline Report offers no economic basis....Consequently, the party trying to argue against application of the Guideline faces a monumental obstacle in attempting to demonstrate a case is "exceptional" without knowing what "unexceptional" is....

The classic cases—the poor woman as custodial parent who has to provide child care herself or pay someone to provide it while she works, and the custodial parent whose standard of living declines as the former spouse's standard of living increases—historically indicate that support orders often did not adequately consider the situations. Consequently, the Child Support Guideline Committee sought to...accommodat[e] them....

In the instant case, however,...the husband, a professional, is the custodial parent and he does not provide child care himself or pay for it since the child lives with her grandparents, and he contributes less than one third of the child's minimal needs. The wife, on the other hand, is a new doctor with substantial educational debts which the Guideline does not accommodate....

The Fitzgeralds' circumstances do not fit the models of concern to the Child Support Guideline Committee. As applied, the Guideline focused solely on the wife's gross income, offset initially only by her malpractice insurance premiums, without regard to either the amount of the husband's child support obligation or the subsistence needs of the wife. Under these circumstances it can hardly be

> argued persuasively that the difference between a net income and a gross income approach is theoretical. Nor is it accurate to conclude that the Guideline maintains the parties' ultimate substantive right to "fact specific individual awards,"...since there is no indication of the husband's expenses.

Fitzgerald, 566 A.2d at 729-32 (citations and footnotes omitted).

HHS's requirement that States review their guidelines against case data and revise them to limit deviations shows sensitivity to the concerns raised in *Fitzgerald*. Even still, given the *Fitzgerald* court's concern about "monumental obstacles" to obtaining awards that deviate from a guideline formula, simply following HHS regulations may not be enough if the guidelines being reviewed are not already close to the objective of setting economically appropriate awards because deviations from the guideline formula may be less frequent and less in amount than is appropriate. A State should therefore consider the full range of commonly occurring factors impacting child support awards based on need and ability to pay and attempt to account for them in its guideline formula.

Georgia has taken the opposite approach. Its initial guideline formula listed 15 special circumstances for deviating on a showing of excessiveness or inadequacy. *See* 1989 Ga. Laws 861, 863-4. Rather than incorporating these factors into the formula over time, Georgia has merely added to the list, which has now grown to 18 special circumstances, including the catch all "as required by the ends of justice." *See* O.C.G.A. § 19-6-15(c) (2002).

As enacted, Georgia's guideline formula suffers two inherent economic flaws. First, by basing presumptive awards solely on obligor gross income and number of children, it fails to account for other typical circumstances relevant to setting awards based on need and ability to pay.

Georgia has made no attempt to evaluate the impact the 18 special circumstances enumerated in its guideline statute have on need and ability to pay or to revise its formula to account for them. The very fact that a special circumstance does not automatically

require adjustment to the presumptive award requires the trier of fact to exercise discretion in whether or not to deviate. However, the guideline statute offers no criteria for evaluating if a special circumstance makes a presumptive award calculated under its formula excessive or inadequate. The 1991 child support commission report provides no record of the underlying economic assumptions, if any, on which Georgia's guideline formula was based, creating uncertainty over when it requires deviation to account for these factors and when it already accounts for them. The only factor other than obligor gross income and number of children Georgia has ever added as an automatic adjustment is cost of obligor life insurance for the children. *See* O.C.G.A. § 19-6-34 (2004).

This uncertainty has impacted Georgia's guideline commissions and courts. As noted by the trial court, the 2001 commission reported that (7a & 83a):

> [its] members agonized over some issues that could not be decided in the limited time frame [of 53 days]....The deliberations of the Commission led to the conclusion that there is need for. . .studies to be conducted...related to...[t]he need for and effect of a low income reserve..., application of the guidelines for high-income obligors..., application of the guidelines when there are multiple/successive households..., [the fact that the] obligee's income is not explicitly factored into the guidelines..., [whether]...the guideline ranges [should] be eliminated or narrowed, [should the guideline be] based on a percentage of gross income...[or] net income, [t]he need for variances for special medical and educational needs; the inclusion of both health insurance and childcare as a variance, and the inclusion of shared custody considerations.

Georgia's 2001 commission conceded "the need for additional information to determine if the enumerated reasons for varying from the established support ranges are being used properly," and made "specific recommendations" to the Governor, including "that a statute be enacted addressing the case disposition form to include relevant variance information, and that the information be

studied." (81a & 83a) No such statute was enacted and no such data has ever been collected or studied.

The 2001 commission also offered no apology for Georgia's failure to include relevant factors in its guideline formula (86a):

> The second prong [in evaluating a guideline] involves the balancing of interests....Some formulae make this a matter for formulaic calculation. Other guidelines define this as a reason for varying from the guideline; this is Georgia's way.

"Georgia's way" directly conflicts with HHS regulations requiring States to revise their guidelines to limit deviations, and the *Fitzgerald* court's holding that designating such fundamental circumstances as deviation factors is inconsistent with setting awards based on need and ability to pay.

Georgia's guidelines also suffer from a second inherent flaw. By calculating presumptive awards as a constant percentage of gross income, its formula sets presumptive awards that increase as a percentage of net income as obligor gross income increases. The trial court found that this formula contradicted recommendations of the national advisory panel on guidelines established by HHS's Office of Child Support Enforcement in 1984 (74a). The final report accompanying this advisory panel's recommendations concluded that a guideline formula with "only two primary parameters, gross income and number of children...has the effect of setting orders as an increasing percentage of net income, as obligor income rises...[, and] is contrary to the economic evidence on actual child rearing expenditures." *See* Office of Child Support Enforcement, U.S. Department of Health & Human Services, *Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report* at II-126 (1987).

Though Georgia has never shown any economic basis for its guideline formula, the minority report of its 1998 commission, authored by the only economist ever to serve on a Georgia child support commission, reveals that the State has been made aware that its existing formula is inconsistent with need and ability to pay (47a) (footnotes omitted):

> For the broad objective...of "appropriateness," all three economic experts directly or indirectly stated that Georgia's presumptive guidelines are excessive at moderately high and high-income levels. . . .[W]hile the guidelines are inadequate at poverty levels of income in terms of covering child costs,...the burden on the obligor is excessive and inappropriate. Separately, an economic study. . .by the author of this Minority Report. . .indicates that. . .the guidelines generally result[] in an inappropriate, significantly higher standard of living for the custodial parent household than for the non-custodial parent. . . . Georgia's guidelines are inappropriately high in many, if not most, income situations. . . .Georgia's guidelines go against mainstream economic research and data. Earlier expert witnesses corroborated this author's research. . . . Experts testified that. . .no economic studies. . .show that child costs rise as a percentage of after-tax income. . . .Georgia's guidelines as applied to a wide income range are without any economic basis. All experts testified that the proper award cannot be determined without both parents' income as part of the presumptive formula and reflecting actual costs to be proportioned. Essentially, the evidence presented to the Commission was that Georgia guidelines do not result in appropriate child support award amounts....

The trial court in this case summed up the situation as follows (6a) (footnotes and citations omitted):

> ...Georgia...has failed to comply with the federal mandate to review and revise its guidelines every four years to "ensure that their application results in the determination of appropriate child support amounts."...As part of its review, the state is required to consider economic data on the cost of raising children....Georgia has not complied....
>
> Furthermore, the state has never analyzed case data on how courts apply and deviate from the guidelines....
>
> The state's inaction has not been redeemed by the periodic appointment of child support commissions with

> limited time, no resources or continuity to develop and study economic and case data, and no authority to correct any identified deficiencies in the guidelines....

By turning a blind eye to Georgia's complete failure to follow federal requirements for establishing, reviewing and revising its guidelines, and terming such failure as "technical noncompliance," Georgia's Supreme Court did major damage to the federal interest that guideline awards reflect need and ability to pay and improve the equity of child support awards.

3. Georgia's Supreme Court created a conflict with decisions of this Court, U.S. courts of appeals and State appellate courts that federal agency approval does not insulate a federally funded State plan from judicial review for compliance with federal regulations..

By "defer[ring]" to HHS approval of its Title IV-D State plan, and reversing the trial court's finding that the State "completely failed" to comply with 45 C.F.R. § 302.56, Georgia's Supreme Court created a conflict with decisions of this Court, U.S. courts of appeals and State appellate courts that federal agency approval does not insulate a State plan from judicial review for compliance with federal regulations. *See, e.g., Youakim*, 425 U.S. at 235-36; *Hagans* , 415 U.S. 528; *Carleson*, 406 U.S. 598; *Townsend* , 404 U.S. 282; *Java*, 402 U.S. 121; *Rosado* , 397 U.S. 397; *King* , 392 U.S. 309; *Lynch v. Philbrook*, 550 F.2d 793, 795 (2d Cir. 1977); *Raskan v. Moran*, 684 F.2d 472, 475 (7th Cir. 1982); *Jackson*, 947 F.2d 332, 335-37 (8th Cir. 1991); *Gorrie*, 809 F.2d 508, 520 (8th Cir. 1987); *Page v. Preisser*, 585 F.2d 336, 339-41 (8th Cir. 1978); *McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982); *Schultz v. Kott*, 131 N.J. Super 216, 329 A.2d 340 (1974); *In re Rose v. Moody*, 83 N.Y.2d 65, 629 N.E.2d 378, 380 (1993), *cert. denied,* 511 U.S. 1084 (1994); *Matter of Bosh v. Fahey*, 53 N.Y.2d 896, 423 N.E.2d 49, 51 (1981); *Matter of Beaudoin v. Toia*, 45 N.Y.2d 343, 380 N.E. 2d 246, 248 (1978); *Matter of Dunbar v. Toia*, 45 N.Y.2d 764, 380 N.E. 2d 321, 322 (1978); *In re Marriage of Gilbert*, 945 P.2d at 243-44 (Wash. App. 1997).

In *Rosado*, this Court explained why an adversely affected individual should be afforded judicial review of State compliance

with a federally funded mandate notwithstanding federal agency approval of the State's plan:

> A further reason given to support the contention that the District Court should have declined to exercise jurisdiction is that the Department of Health, Education, and Welfare was the appropriate forum, at least in the first instance, for resolution on the merits of the questions before us, and that at the time this action came to Court HEW was "engaged in a study of the relationship between Section 602(a)(23) [of Title IV] and [the state law challenged as non-compliant with Title IV]."
>
> In order to evaluate this argument, it is necessary to understand the mechanism by which HEW reviews state plans under the AFDC program. States desiring to obtain federal funds available for AFDC programs are required to submit a plan to the Secretary of HEW for his approval. Once initially approved, federal funds are provided to the State until a change in its plan is formally disapproved. The Secretary must afford the State notice of an alleged noncompliance with federal requirements and an opportunity for a hearing. If, after notice and hearing, the Secretary finds that the State does not comply with the federal requirements, he is directed to make a total or partial cutoff of federal funds to the State. 42 U.S.C. § 1316 describes the administrative procedures that the Secretary must afford a State before cutting off funds, and also provides for review in the courts of appeals of the Secretary's action at the behest of the State. Whether HEW could provide a mechanism by which welfare recipients could theoretically get relief is immaterial. It has not done so, which means there is no basis for the refusal of federal courts to adjudicate the merits of these claims.
>
> Petitioners answer, we think correctly, that neither the principle of "exhaustion of administrative remedies" nor the doctrine of "primary jurisdiction" has any application to the situation before us. Petitioners do not seek review of an administrative order, nor could they have obtained an administrative ruling since HEW has no procedures

> whereby welfare recipients may trigger and participate in the Department's review of state welfare programs.
>
> That these formal doctrines of administrative law do not preclude federal jurisdiction does not mean, however, that a federal court must deprive itself of the benefit of the expertise of the federal agency that is primarily concerned with these problems. Whenever possible the district courts should obtain the views of HEW in those cases where it has not set forth its views, either in a regulation or published opinion or in cases where there is real doubt as to how the Department's standards apply to the particular state regulation or program.
>
> The District Court...made considerable effort to learn the views of HEW. The possibility of HEW's participation, either as a party or an *amicus*, was explored in the District Court and the Department at that stage determined to remain aloof. We cannot in these circumstances fault the District Court for proceeding to try the case.

397 U.S. at 405-7 & n.8 (some citations and footnotes omitted).

Here, the trial court benefited from HHS's interpretation of the federal statute and exercise of delegated authority, namely its own regulations adopted pursuant to 42 U.S.C. § 652(a)(1) and codified at 45 C.F.R. § 302.56. As Georgia's Supreme Court noted, the trial court found that Georgia "completely failed to abide by 45 CFR § 302.56(h)." (19a)

In enquiring whether HHS had evaluated Georgia's compliance with 45 C.F.R. § 302.56(h), the trial court considered HHS's response to a Freedom of Information Act request, by Petitioner's economic expert, for records showing Georgia's guidelines had an economic basis. The trial court found (8a):

> HHS confirmed...that it did not have on file any studies, or records of any studies, to validate Georgia's guidelines as economically appropriate.

The trial court thus established sufficient grounds to conclude that HHS had not verified Georgia's compliance with 45 C.F.R. § 302.56, and had failed to enforce its own regulations.

Deference by Georgia's Supreme Court to HHS approval of its State plan, given the trial court's finding that HHS regulations are clear and Georgia's failure to comply with them is equally clear, also conflicts with numerous decisions of U.S. courts of appeals holding that a federal agency must follow its own regulations in exercising its discretion, and abuses its discretion by failing to do so. *See, e.g., Schroeder v. West*, 212 F.3d 1265, 1270 (Fed. Cir. 2000) (federal agency must follow its regulations in assisting a veteran seeking disability benefits); *Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996) (Department of Commerce must follow its regulations in determining whether to assess antidumping duties); *Shepherd v. Merit Systems Protection Board*, 652 F.2d 1040, 1043 (D.C. Cir. 1981) (Merit Systems Protection Board and Office of Personnel Management must follow the latter agency's regulations in considering federal employee's claim to have her position converted to a career position); *Furnari v. Warden*, 218 F.3d 250 (3rd Cir. 2000); *Moret v. Karn*, 746 F.2d 989, 992 (3rd Cir. 1984) (INS must follow its regulations in determining whether to exclude an alien).

The D.C. Circuit Court of Appeals held in *Shepherd,* 652 F.2d at 1043, that:

> An agency's interpretation of its enabling statute and its own regulations is usually entitled to deference, but there are limits on when and how far a court should defer to the agency. In any event, of course, we must overturn agency action and interpretation inconsistent with the regulations and statutes themselves.

In this case, the trial court's undisturbed findings reveal that Georgia has "*never* shown any economic basis for its guidelines." (8a) (emphasis in original). Accordingly, Georgia's guidelines completely fail to comply with HHS regulations that they be periodically revised, based on economic data and case outcomes, to ensure that deviations are limited.

Speculation by Georgia's Supreme Court that HHS exercised its discretion "to disregard [Georgia's] technical noncompliance with [Title IV-D]" has no foundation in the record or HHS regulations. The requirement of 45 C.F.R. § 302.56 that Georgia base its child support guidelines on economic reality, and on how its child support cases are adjudicated, reflects the very essence of congressional intent. Georgia's Supreme Court, in reversing the trial court's undisturbed finding that Georgia completely failed to comply with that requirement, created a conflict with established precedent and has again moved federal jurisprudence in the wrong direction.

CONCLUSION

Georgia's participation in Title IV-D requires it to establish and maintain child support guidelines reasonably calculated to result in presumptive awards that reflect need and ability to pay. The trial court's undisturbed findings show Georgia failed to abide by these federal requirements. In reversing the trial court, Georgia's Supreme Court rendered a decision in conflict with decisions of this Court and numerous federal and State appellate courts. This erroneous ruling has an adverse impact on Petitioner, her third child and millions of other child support obligors and their subsequent children. Accordingly, this Court should grant this petition and review the decision of Georgia's Supreme Court.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

TEMPORARY ORDER OF TRIAL COURT

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

LAURA JEAN MCFALL	)	
	)	
Plaintiff,	)	
	)	**Civil Action**
v.	)	**File No. 02-CV-2287N**
	)	
CHRISTOPHER WADE WARD	)	
	)	
	)	
Defendant.	)	

TEMPORARY ORDER

The above and foregoing matter having come to the attention of the Court on January 17, 2003, for hearing on Plaintiff's Motions for Modification of Child Support and Declaratory Judgment, and after consideration of the Motions, the evidence, and testimony presented, it is hereby

ORDERED that Plaintiffs' Motions for Modification of Child Support and Declaratory Judgment are GRANTED.

Plaintiff Laura McFall was divorced from Defendant Christopher Ward in Rockdale County, Georgia on October 12, 1993. The parties have two minor children, Christopher, born March 28, 1989, and Mikel, born November 12, 1990. The Defendant has remarried and has custody of both children.

On July 9, 1999, a Consent Modification Order was entered in the Superior Court of Fulton County, Georgia. It provided that the Plaintiff would pay the Defendant 25% of her income ($375 per month) as child support, which would be reduced to $75 per month during the summer when the children would reside with the Plaintiff. Following the 1999 modification, the Plaintiff moved to Illinois where, due to financial considerations, she has yet to have

the children visit. Her visitation in the summer has been reduced by agreement to two weeks, plus occasional visits arranged on 48-hours notice. The parties have stipulated a $1,000 child support arrearage by the Plaintiff.

The Plaintiff is providing health insurance for Christopher and Mikel, and she incurs the cost of travel to visit them. The Defendant's monthly gross income is $2,400 and the Plaintiff's monthly gross income is $1,733. The Plaintiff seeks a downward modification of her child support and she seeks to have Georgia's child support guidelines declared null and void due to the state's failure to follow the federal mandate for establishing the guidelines, as well as the state's failure to have them reviewed and amended after appropriate study required by the federal mandate.

Modification of Child Support

O.C.G.A. § 19-6-15 provides that the child support award shall be determined by multiplying the noncustodial parent's gross income per pay period by a percentage based on the number of children for whom child support is being determined. *O.C.G.A § 19-6-15(b)(5).* Application of these guidelines creates a rebuttable presumption that the amount of support awarded is correct; however, the presumption may be rebutted by "a written finding or specific finding on the record" that application of the guidelines would be unjust or inappropriate in a particular case. *Id.* The Code provides a list of 18 "special circumstances" that must be considered before the trier of fact may vary the final award of child support up or down from the range enumerated in the guidelines; the written finding that one or more special circumstance is present makes the presumptive award either excessive or inadequate:

> "(1) Ages of the children;
>
> (2) A child's extraordinary medical costs or needs in addition to accident and sickness insurance, provided that all such costs or needs shall be considered if no insurance is available;
>
> (3) Educational costs;

(4) Day-care costs;

(5) Shared physical custody arrangements, including extended visitation;

(6) A party's other support obligations to another household;

(7) Income that should be imputed to a party because of suppression of income;

(8) In-kind income for the self-employed, such as reimbursed meals or a company car;

(9) Other support a party is providing or will be providing, such as payment of a mortgage;

(10) A party's own extraordinary needs, such as medical expenses;

(11) Extreme economic circumstances including but not limited to:

(A) Unusually high debt structure; or

(B) Unusually high income of either party or both parties, which shall be construed as individual gross income of over $75,000.00 per annum;

(12) Historical spending in the family for children which varies significantly from the percentage table;

(13) Considerations of the economic cost-of-living factors of the community of each party, as determined by the trier of fact;

(14) In-kind contribution of either parent;

(15) The income of the custodial parent;

(16) The cost of accident and sickness insurance coverage for dependent children included in the order;

(17) Extraordinary travel expenses to exercise visitation or shared physical custody; and

(18) Any other factor which the trier of fact deems to be required by the ends of justice."

O.C.G.A. § 19-6-15(c).

The presumptive award in this case is calculated by multiplying the Plaintiff's gross monthly income of $1733 by the statutory range of 23 to 28 percent for the support of two children, as specified in the guidelines. This results in a presumptive award of $389 at the lower end of the percentage range to $485 at the higher end. In considering the enumerated special circumstances, the Court finds that two of them should be applied: (15) the Defendant's income of $2400 ($1874 after taxes), and (18) the Plaintiff's income *as reduced by required taxes* ($1410). To this Court, the effect of federal, state and other mandated taxes on the noncustodial parent's gross income is always a factor "required by the ends of justice" to be considered in calculating child support awards.

In this case, consideration of the aforementioned factors justifies a downward departure from the statutory range; accordingly, the Court finds that the Plaintiff's total monthly child support obligation shall be $258. Because the Plaintiff provides health insurance for the two minor children at a monthly cost of $125, the net cash award to the Defendant shall be $133, payable through an income deduction order. The Plaintiff is further ordered to maintain said health insurance policy or its equivalent as long as coverage is reasonably available through her current or future employer. If such insurance is not maintained, the Plaintiff shall be liable to pay Defendant the total amount of $258 cash per month. The parties shall each pay half of the unreimbursed medical expenses.

After one child is no longer eligible for support, child support shall be reduced to $185 per month for the Plaintiff's total obligation for the remaining child. This is based on $125 per month for medical insurance coverage and $60 monthly cash paid by the Plaintiff to the Defendant. If such medical insurance is not

maintained for the remaining child, the Plaintiff shall be liable to pay the Defendant the total amount of $125 cash per month.

The Plaintiff must satisfy her $1,000 child support arrearage to the Defendant within 60 days of this Temporary Order.

By agreement of the parties, they shall execute all appropriate documents required by Georgia law to allow direct payment from the Plaintiff's employer to the Defendant.

The Plaintiff's summer visitation is reduced to two weeks by stipulation of the parties. However, other visitation as provided in previous Orders shall remain in effect.

Declaratory Judgment

The Supremacy Clause of the U.S. Constitution limits the power of the government of the State of Georgia when it participates in federally funded programs. It provides that "this Constitution, and the Laws of the United States made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const., art. VI, cl. 2.* As part of our constitutional system of checks and balances, this Court has oversight of the laws passed by the General Assembly to ensure that they do not violate principles of federalism or abridge individual constitutional rights. For the reasons set forth below, this Court concludes that Georgia's child support guidelines fail to comply with the federal mandate requiring the state to adopt and periodically revise the guidelines in line with current economic data.

Congress first used its spending power to require states to establish non-binding child support guidelines in the Child Support Enforcement Amendments of 1984.[1] In the Family Support Act of 1988, Congress made the guidelines *mandatory*

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[1] *See* Pub. L. No. 98-378, sec. 18, 98 Stat. 1305, 1320-1 (1984) (codified as amended at 42 U.S.C. § 667).

and required states to use them in setting child support awards.[2] Regulations applying to all state guidelines were promulgated by the U.S. Department of Health and Human Services (HHS) and set forth at 45 C.F.R. § 302.56, providing, in pertinent part:

> "(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State....
>
> (e) The State *must review*, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts....
>
> (h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State *must consider economic data on the cost of raising children* and analyze cost data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines...."

45 C.F.R. § 302.56 (emphasis supplied).

In response to the federal mandate, the General Assembly revised Georgia's child support guidelines in its 1989 regular session "to implement certain provisions of the federal Family Support Act of 1988"[3] and , in 1994, following an HHS complaint, the General Assembly amended the guidelines to address non-compliance with the Act.[4] Georgia, however, has failed to comply with the federal mandate to review and revise its guidelines every four years to "ensure that their application results in the determination of appropriate child support amounts." *42 U.S.C. § 667(a); 45 C.F.R. § 302.56(e).* As part of its review, the state is

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[2] *See* Pub. L. No. 100-485, tit. I, sec. 103(a) & (b), 102 Stat. 2343, 2346 (1988) (codified as amended at 42 U.S.C § 667).

[3] *See* 1989 Ga. Laws 861, 862 (preamble) (codified as amended at O.C.G.A. §19-6-15).

[4] *See* 1994 Ga. Laws 1728 (preamble) ("to provide for written findings" and "to provide a rebuttable presumption") (codified as amended at O.C.G.A. § 19-6-15).

required to consider economic data on the cost of raising children. 45 C.F.R. § 302.56(f). Georgia has not complied with this mandate, despite having convened two child support commissions since 1989.[5] The 1998 Georgia Commission candidly concluded that "[a]nother problem encountered by the members [of the Commission], in their evaluation of Georgia's Child Support Guidelines, was the lack of accurate data on the cost of raising a child in Georgia." *1998 Georgia Report* at 2. The 2001 Georgia Commission less candidly "determined that the present guidelines were generally appropriate and reflective of the 'costs of raising a child,'" but without citing any economic data. *2001 Georgia Report* at 1.

Furthermore, the state has never analyzed case data on how courts apply and deviate from the guidelines as mandated by 45 C.F.R. § 302.56(h). The 1998 Georgia Commission apparently relied on anecdote and public perception to conclude that "the current guidelines are working well and should not be changed." *1998 Georgia Report* at 4. The 2001 Georgia Commission similarly failed to review any actual case data in concluding that the guidelines "result in child support awards that are generally appropriate." *2001 Georgia Report* at 2.

The state's inaction has not been redeemed by the periodic appointment of child support commissions with limited time, no resources or continuity to develop and study economic and case data, and no authority to correct any identified deficiencies in the guidelines. The 2001 Georgia Commission reported that:

> "[its] members agonized over some issues that could not be decided in the limited time frame [53 days] . . . . The deliberations of the Commission led to the conclusion that there is need for one or more systematic studies conducted prior to the next Commission related to . . . [t]he need for and effect of a low-income reserve, . . . [t]he application of

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[5] *Report of the 2001 Georgia Commission on Child Support* (*2001 Georgia Report*) at 1 ("Pursuant to 42 U.S.C. § 667 and 45 C.F.R. § 303.56 [sic], a state must review child support guidelines every four years"); *Report of the 1998 Georgia Commission on Child Support* (*1998 Georgia Report*) at 1 ("The [1998] Commission was created in accordance with the Family Support Act of 1998 . . . [and] the federal regulations at 45 C.F.R. § 302.56(e)").

> the guidelines for high-income obligors . . . , [t]he application of the guidelines when there are multiple/successive households . . . , [the fact that the] obligee's income is not explicitly factored into the guidelines . . ., [and whether] the guideline ranges [should] be eliminated or narrowed."

2001 Georgia Report at 3. In the same vein, the 1998 Georgia Commission reported that it "contacted Georgia State University to investigate the feasibility of the University doing a systematic and statistically valid case data analysis . . . [but] such a study could not be completed within the term of the 1998 Georgia Commission . . . ." *1998 Georgia Report* at 2.

Congress directed states to develop child support guidelines based on economic study, yet Georgia has failed to do so. The Senate Report accompanying the 1984 Child Support Enforcement Amendments made clear that "[t]he development of such guidelines will necessarily require States to devote some study to what is appropriate and to review what other States have done. For this reason, the amendment allows two full years (until October 1986) for States to develop the guidelines." *1984 U.S.C.C.A.N. 2397, 2436.* Georgia's session laws reveal no legislative activity until 1989, when the present guidelines were adopted, and the record is devoid of any evidence that prior economic study was done.[6] According to the uncontroverted evidence before this Court,[7] the state has *never* shown any economic basis for its guidelines.[8]

Georgia adopted a guideline formula, based primarily on obligor gross income and the number of children to be supported, that the national Advisory Panel on Child Support Guidelines had

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[6] 1989 Ga. Laws 861 (codified as amended at O.C.G.A. § 19-6-15).

[7] The Attorney General was served with notice of this hearing but did not appear or present evidence.

[8] Mark Rogers, the economist who testified in this case, inquired directly to HHS regarding this issue. In response to a request directed by Mr. Rogers to HHS under the Freedom of Information Act, HHS confirmed in its reply dated January 7, 2003, that it did not have on file any studies, or records of any studies, to validate Georgia's guidelines as economically appropriate and consistent with professional studies on child costs. *See* HHS FOIA Case No. 2001-617RE, May 3, 2002.

previously concluded was against the economic evidence.[9] The Panel's report recommended that states adopt one of two types of guideline formulae in use at that time, the Income Shares model or the Melson formula.[10] In adopting a guideline formula that is "contrary to the economic evidence on actual child rearing expenditures,"[11] Georgia ignored the federal mandate to consider economic data on the cost of raising children; accordingly, Georgia's guidelines conflict with 45 C.F.R. § 302.56(h) in violation of the Supremacy Clause.

Because the General Assembly enacted child support guidelines to ensure that Georgia would continue to receive federal funding for child support programs, the Supremacy Clause of the U.S. Constitution requires the state to comply with the applicable federal regulations. *Townsend v. Swank*, 404 U.S. 282 (1971); *Calif. Dept. of Human Resources Development v. Java*, 402 U.S. 121 (1971); *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309 (1968). The U.S. Supreme Court has recognized the right of adversely affected individuals to challenge state non-compliance with federal funding mandates. *Id.* Furthermore, the Supremacy Clause requires this Court to invalidate the guidelines if they violate the federal mandate. *Id.* Finally, the U.S. Supreme Court has held that a reviewing court is not bound by a federal agency finding of state compliance and must undertake an independent review when state compliance is challenged by an individual claimant. *Townsend v. Swank*, 404 U.S. at 286.

The evidence before this Court is clear and uncontroverted that the State of Georgia has not complied with federal requirements in setting and/or revising its child support guidelines. It has not considered economic data on the cost of raising children nor analyzed case data in reviewing the guidelines as contemplated by 45 C.F.R. § 302.56(e) and (h). Georgia's failure to comply with the federal mandate makes the application of the state's child support guidelines inconsistent with federal law under the

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[9] *See* Office of Child Support Enforcement, U.S. Department of Health and Human Services, Development of Guidelines for Child Support Orders: Advisory Panel Recommendations and Final Report (1987)

[10] *Id.* at I-15.

[11] *Id.* at I-26.

Supremacy Clause of the U.S. Constitution, which this Court is bound to uphold.

Until such time as the General Assembly brings O.C.G.A § 19-6-15 into compliance with the federal mandate pursuant to which it was adopted, this Court stays the application of Georgia's child support guidelines and declines to apply the statute in future cases. Accordingly, Plaintiff's Motions for Modification of Child Support and Declaratory Judgment are **GRANTED**.

SO ORDERED this 10th day of February, 2003.

/s/
Sidney L. Nation, Sr., Chief Judge
Rockdale Superior Court
Rockdale Judicial Circuit

TRIAL COURT'S CERTIFICATE OF IMMEDIATE REVIEW

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

LAURA JEAN MCFALL,	)	
	)	
Plaintiff	)	
	)	**Civil Action**
v.	)	**File No. 02-CV-2287N**
	)	
CHRISTOPHER WADE WARD,	)	
	)	
	)	
Defendant	)	

CERTIFICATE OF IMMEDIATE REVIEW

The Court hereby certifies that the issues addressed in the Temporary Order in this case are of such importance to this case and to this state that *immediate review* is appropriate and is therefore granted, sua sponte.

This 10th day of February 2003.

/s/
Sidney L. Nation, Sr., Chief Judge
Rockdale Superior Court
Rockdale Judicial Circuit

AMENDED TEMPORARY ORDER OF GEORGIA TRIAL COURT

IN THE SUPERIOR COURT OF ROCKDALE COUNTY
STATE OF GEORGIA

LAURA JEAN MCFALL	)	
	)	
Plaintiff,	)	
	)	**Civil Action**
v.	)	**File No. 02-CV-2287N**
	)	
CHRISTOPHER WADE WARD	)	
	)	
	)	
Defendant.	)	

AMENDED TEMPORARY ORDER

It having come to the attention of the Court that the Temporary Order entered on February 10, 2003, requires certain addendums and corrections, the Order is hereby **AMENDED** as follows:

1) *The first full sentence at the top of page two (2)* [2a] *is corrected to read:*

"The parties have stipulated a $1,080 child support arrearage by the Plaintiff."

2) *The last sentence on page four (4)* [5a] *is corrected to read:*

"The Plaintiff must satisfy her $1,080 child support arrearage to the Defendant within 50 days of this Temporary Order."

3) *After the second paragraph on page five* [5a], *the following paragraph is added:*

"Neither party shall threaten, harass, or molest the other, nor disparage or belittle the other party in the presence of the children. In the event such prohibited conduct should occur, the non-offending party shall be entitled to bring an action for Contempt

against the other party, and the offending party shall face the threat of incarceration."

4) *The last paragraph on page eight (8)* [9a], *continuing on page nine (9)* [9a] *is amended to read:*

"Because the General Assembly enacted child support guidelines to ensure that Georgia would continue to receive federal funding for child support programs, the Supremacy Clause of the U.S. Constitution requires the state to comply with the applicable federal regulations. *Townsend v. Swank,* 404 U.S. 282 (1971); *Calif. Dept. of Human Resources Development v. Java,* 402 U.S. 121 (1971); *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968); *In re Marriage of Gilbert,* 88 Wash. App. 362 (1997); *In re Matter of Rose on Behalf of Clancy v. Moody,* 83 N.Y.2d 65 (1993), *cert. denied,* 511 U.S. 1084 (1994). Adversely affected individuals have been given the right to challenge state non-compliance with federal funding mandates. *Id.* Furthermore, the Supremacy Clause requires this Court to invalidate the guidelines if the violate the federal mandate. *Id.* Finally, the U.S. Supreme Court has held that a reviewing court is not bound by a federal agency finding of state compliance and must undertake to [sic] independent review when state compliance is challenged by an individual claimant. *Townsend v. Swank,* 404 U.S. at 286."

SO ORDERED this 17th day of February, 2003, *nune pro tunc* to 10th day of February, 2003.

/s/
Sidney L. Nation, Sr., Chief Judge
Rockdale Superior Court
Rockdale Judicial Circuit

ORDER OF GEORGIA SUPREME COURT GRANTING APPEAL

Supreme Court
State of Georgia
State Judicial Building
Atlanta 30334

Norman S. Fletcher, Chief Justice — Sherie H. Welch, Clerk
Leah Ward Sears, Presiding Justice — Wm. Scott Henwood, Reporter
Robert Benham
George H. Carley
Hugh P. Thompson
P. Harris Hines
Justices

March 27, 2003

TO ALL COUNSEL

RE: Application No. S0310836 CHRISTOPHER WADE WARD v. LAURA JEAN McFALL

The Supreme Court today granted the above referenced application for Interloculatory Appeal. All the Justices concur, except Hunstein, Jr., who is disqualified.

The appellant's notice of appeal must be filed in the trial court within ten days of the date shown above. Once the record is received from the trial court and docketed in this Court, notices will be mailed to all counsel showing the date of docketing and the case number assigned. The appellee's briefs will be due within 40 days of docketing, or within 20 days of the filing of appellant's briefs, which is later. See Rule 12.

This Court is particularly concerned with, and requests that you address in your brief, the following:

Whether the superior court erred in finding that Georgia's Child Support Guidelines, OCGA § 19-6-15, violate the Supremacy Clause of the Constitution of the United States?

Sherie M. Welch, Clerk

By: /s/
Jeanette Eidson

ORDER OF GEORGIA SUPREME COURT GRANTING EXTENSION OF TIME

SUPREME COURT OF GEORGIA
Case No. S03A1365

Atlanta, June 5, 2003

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CHRISTOPHER WADE WARD v. LAURA JEAN McFALL

Your request for an extension of time to file the appellee's brief in the above case is granted. You are given an extension of 14 days until July 28, 2003, to file. Failure to do so will subject you to the sanctions and Rules 7 and 10 of this Court.

A copy of this order MUST be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year above written.

/s/_____, Clerk

DECISION OF GEORGIA SUPREME COURT REVERSING TRIAL COURT

WARD v. McFALL.

S03A1365.

SUPREME COURT OF GEORGIA

2004 Ga. LEXIS 179; 2004 Fulton County D. Rep. 759

March 1, 2004, Decided

NOTICE: NOT FINAL UNTIL EXPIRATION OF THE REHEARING PERIOD. THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COURT.

DISPOSITION: Judgment reversed.

COUNSEL: For Appellant: Brett A. Schroyer, SCHLUETER, BUCK & CHILDERS, Conyers, GA.

For Appellee: Daryl G. Lecroy, Atlanta, GA.
Hon. Thurbert E. Baker, A.G., Department of Law, Atlanta, GA. [sic]
Richard Paul Keck, TROUTMAN SANDERS, LLP, Atlanta, GA.

JUDGES: Hines, Justice. Fletcher, C. J., Sears, P. J., Benham, Carley, and Thompson, JJ., and Judge Stephanie Brodie Manis concur. Hunstein, J., disqualified.

OPINION BY: Hines

OPINION:

Hines, Justice.

Christopher Ward appeals from an order declaring O.C.G.A. § 19-6-15(b) unconstitutional. We reverse.

Ward and Laura McFall were divorced in Rockdale County in 1993. There are two children of the marriage, born in 1989 and 1990. Ward has custody of the children. In 1999, a consent modification order was entered in Fulton County providing that McFall would pay 25% of her income ($ 375 a month) as child support, with a reduction for the summer months when the children lived with her. She was also to provide medical insurance for the children through her employer. In September, 2002, McFall filed a complaint to modify child support and visitation, and in November, 2002, moved for a declaration that the Georgia Child Support Guidelines ("Guidelines") found in O.C.G.A. § 19-6-15(b) are unconstitutional.

In a temporary order, the trial court applied the guidelines, determined that special circumstances existed, see O.C.G.A. § 19-6-15(c), adjusted the child support award produced by the guidelines downward, and set McFall's obligation at $ 125 per month.[1] In the same order[2] the court addressed the constitutionality of the guidelines, found that O.C.G.A. § 19-6-15(b) did not satisfy certain mandates of 45 CFR § 302.56, and declared O.C.G.A. § 19-6-15 invalid by virtue of the Supremacy Clause of the United States Constitution. U.S. Const., Art. VI. The trial court issued a certificate of immediate review and this Court granted Ward's application for interlocutory appeal. See O.C.G.A. § 5-6-34(b).

Georgia participates in the federal Aid to Families with Dependent Children program, which provides benefits to certain needy families, under the Social Security Act. See 42 U.S.C.A. § 601 et seq. As part of an interlocking set of initiatives and statutes, and in order to qualify for federal funds, Georgia's child support program must comport with requirements set forth in Title IV, Part D of the Social Security Act. See 42 U.S.C.A. § § 609 and 651-669b; *Blessing v. Freestone*, 520 U.S. 329, 333-335 (117 S. Ct. 1353, 137 L. Ed. 2d 569) (1997); *Sullivan v. Stroop*, 496 U.S. 478 (110 S. Ct. 2499, 110 L. Ed. 2d 438) (1990). Under 42 U.S.C.A. § 667, as part of its "state plan," Georgia must establish guidelines for child support award amounts. These guidelines are found in

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[1] The trial court also addressed child support arrearage and visitation.

[2] The order was later amended.

O.C.G.A. § 19-6- 15. The guidelines "shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts."[3] 42 U.S.C.A. § 667(a). Administrative interpretation of this Congressional requirement has been codified at 45 CFR § 302.56. Subsection (h) of this regulation states:

> As part of the review of a State's guidelines . . . a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from the guidelines.

The trial court found that Georgia had completely failed to abide by 45 C.F.R. § 302.56(h), and therefore held the State's child support guidelines were invalid.[4]

1. We must first examine our jurisdiction. McFall contends that appellate jurisdiction of this case is properly in the Court of Appeals. She argues that the trial court did not declare O.C.G.A. § 19-6-15 unconstitutional, but only determined that the trial court would not apply this statute because Georgia was not in compliance with federal law. But that view of the trial court's action is too restricted. O.C.G.A. § 19-6-15 is a legislative enactment of the General Assembly and is the law of this State. See Ga. Const. of 1983, Art. III, § I, P I; Art. III, § VI, P I; Art. III, § VI, P IV. If O.C.G.A. § 19-6-15 is in violation of the Constitution of the United States, it is the trial court's obligation to declare the statute void. Ga. Const. of 1983, Art. I, § II, P V. The trial court explicitly found O.C.G.A. § 19-6-15 to be inconsistent with the federal regulation, and therefore, in violation of the Supremacy Clause of the Constitution of the United States. U.S. Const., Art. VI. The trial court's order cannot be construed to be anything other than a declaration that O.C.G.A. § 19-6-15 is unconstitutional under the Supremacy Clause. See *Hagans v. Lavine*, 415 U.S. 528, 533 (39 L. Ed. 2d 577, 94 S. Ct. 1372) (n. 5)

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[3] O.C.G.A. § 19-6-15(d) provides for the establishment of a commission to review the guidelines. It is undisputed that the Commission last met in 2001.

[4] In *Georgia Dept. of Human Resources v. Sweat*, 276 Ga. 627 (580 S.E.2d 206) (2003), this Court addressed due process, equal protection, privacy, and takings challenges to the constitutionality of O.C.G.A. § 19-6-15.

(1974). Thus, appellate jurisdiction is properly in this Court. Ga. Const. of 1983, Art. VI, § VI, P II.

2. When discussing whether a state statute may stand under the Supremacy Clause, the Supreme Court of the United States has declared:

> Pre-emption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." [Cits.] Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'" [Cit.], and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," [Cit.], or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," [Cits].

Gade v. National Solid Wastes Mgmt. Assn., 505 U.S. 88, 98 (112 S. Ct. 2374, 120 L. Ed. 2d 73) (1992).

There is no Congressional statement of pre-emption, nor is this an area in which Congress left no room for states to act; on the contrary, Congress clearly contemplated, even mandated, state enactment of guidelines. Similarly, there is no question of a conflict concerning compliance with both federal and state regulations; Congress did not set child support guidelines. Only state guidelines exist. Thus, the question of pre-emption in this instance revolves around the issue of whether the child support guidelines, and the method by which they are reviewed, are an obstacle to Congressional goals.

There is a strong presumption *against* pre-emption in domestic relations matters, as it is traditionally an area of state regulation. *Egelhoff v. Egelhoff*, 532 U.S. 141, 156-157 (121 S. Ct. 1322, 149 L. Ed. 2d 264) (2001). The United States Supreme Court has stated:

> We have consistently recognized that "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." [Cits.] "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." [Cits.] Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." [Cits.]

Rose v. Rose, 481 U.S. 619, 625 (107 S. Ct. 2029, 95 L. Ed. 2d 599) (1987).

Here, the federal interest is in obtaining child support orders to enforce the obligations of non-custodial parents. See 42 U.S.C.A. § 651. If Georgia has not reviewed[5] its guidelines in the exact manner stated in 45 CFR § 302.56(h), it does not "do major damage" to that federal interest. As the trial court found, Georgia's Commission on Child Support has prepared reports which conclude that the guidelines produce appropriate child support amounts, as Congress required in 42 U.S.C.A. § 667(a). The question of whether the Commission's conclusion is inadequate is presented by the associated administrative regulation, 45 CFR § 302.56(h).

But this regulation is not the only administrative decision involved. The guidelines review requirement of 42 U.S.C.A. § 667 is found in Part D, Subchapter IV of the Social Security Code. Under 42 U.S.C.A. § 609(a)(8), the United States Secretary of Health and Human Services is to reduce a state's grant if the state is not in compliance with Part D, but the Secretary has the discretion to judge whether a state has "substantially complied" with Part D, and to disregard technical noncompliance with it. It is undisputed that the Secretary has approved and certified Georgia's plan and amendments under 42 U.S.C.A. § § 602 and 652(a)(3),

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[5] It is undisputed that Georgia's Commission on Child Support has prepared reviews in order to satisfy the statute and regulation.

and has taken no action to reduce Georgia's grant. In such circumstances, courts typically defer to the "executive department's construction of a statutory scheme it is entrusted to administer." [Cit.] *Japan Whaling Assn. v. American Cetacean Soc.*, 478 U.S. 221, 233 (106 S. Ct. 2860, 92 L. Ed. 2d 166) (1986). As the responsible federal executive agency has determined that Georgia's guidelines are in conformity with the federal statutory scheme, we will defer to that determination.

Accordingly, we find that the guidelines do not frustrate the stated Congressional purpose, and that the statute is not unconstitutional under the Supremacy Clause.

Judgment reversed. Fletcher, C. J., Sears, P. J., Benham, Carley, and Thompson, JJ., and Judge Stephanie Brodie Manis concur. Hunstein, J., disqualified.

ORDER OF GEORGIA SUPREME COURT DENYING REHEARING

SUPREME COURT OF GEORGIA

Case No. S03A1365 Atlanta, March 19, 2004

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

CHRISTOPHER WADE WARD v. LAURA JEAN McFALL

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

Fletcher, C.J., Sears, P.J., Behanm, Carley, Thompson and Hines, JJ., and Judge Stephanie B. Manis concur. Hunstein, J., disqualified.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year above written.

/s/
Sherie M. Welch, Clerk

U.S. CONSTITUTION ARTICLE VI, CLAUSE 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Article VI, Clause 2.

42 U.S.C. § 667

§667. State guidelines for child support awards
(a) Establishment of guidelines; method

Each State, as a condition of having its State plan approved under [Title IV-D] must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

(c) Technical assistance to States; State to furnish Secretary with copies

The Secretary shall furnish technical assistance to the States for establishing the guidelines, and each State shall furnish the Secretary with copies of its guidelines.

45 C.F.R. § 302.56

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§ 302.56 Guidelines for setting child support awards.

(a) Effective October 13, 1989, as a condition of approval of its State plan, the State shall establish one set of guidelines by law or by judicial or administrative action for setting and modifying child support award amounts within the State.

(b) The State shall have procedures for making the guidelines available to all persons in the State whose duty it is to set child support award amounts.

(c) The guidelines established under paragraph (a) of this section must at a minimum:

(1) Take into consideration all earnings and income of the noncustodial parent;

(2) Be based on specific descriptive and numeric criteria and result in a computation of the support obligation; and

(3) Provide for the child(ren)'s health care needs, through health insurance coverage or other means.

(d) The State must include a copy of the guidelines in its State plan.

(e) The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts.

(f) Effective October 13, 1989, the State must provide that there shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of the guidelines established under paragraph (a) of this section is the correct amount of child support to be awarded.

(g) A written finding or specific finding on the record of a judicial or administrative proceeding for the award of child support that the application of the guidelines established under paragraph (a) of this section would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case, as determined under criteria established by the State. Such criteria must take into consideration the best interests of the child. Findings that rebut the guidelines shall state the amount of support that would have been required under the guidelines and include a justification of why the order varies from the guidelines.

(h) As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

O.C.G.A. § 19-6-15

§ 19-6-15. Child support in final verdict or decree; computation of award; guidelines for determining amount of award; continuation of duty to provide support; duration of support

(a) The provisions of this Code section shall not apply with respect to any divorce case in which there are no minor children, except to the limited extent expressly authorized in subsection (e) of this Code section; and in a divorce case in which there are no minor children the requirements of this Code section for findings of fact and inclusion of findings in the verdict or decree shall not apply. In the final verdict or decree, the trier of fact shall specify in what amount and from which party the minor children are entitled to permanent support. The final verdict or decree shall further specify as required by Code Section 19-5-12 in what manner, how often, to whom, and until when the support shall be paid. The final verdict or decree shall further include a written finding of the gross income of the father and the mother and the presence or absence of special circumstances in accordance with subsection (c) of this Code section. The trier of fact must also determine whether the accident and sickness insurance for the child or the children involved is reasonably available at reasonable costs through employment related or other group health insurance policies to an obligor. For purposes of this Code section, accident and sickness coverage shall be deemed available if the obligor has access to any policy of insurance authorized under Title 33 through an employer or other group health insurance plan. If the accident and sickness insurance is deemed available at reasonable cost, the court shall order the obligor to obtain the coverage; provided, however, if the obligee has accident and sickness insurance for the child or children reasonably available at reasonable costs through employment related or other group health insurance policies, then the court may order that the child or children be covered under such insurance and the obligor contribute as part of the child support order such part of the cost of providing such insurance or such part of any medical expenses incurred on behalf of the child or children not covered by such insurance as the court may deem equitable or appropriate. If currently unavailable or unreasonable in cost, the court shall order

the obligor to obtain coverage when it becomes available at a reasonable cost, unless such insurance is provided by the obligee as provided in this subsection. When support is awarded, the party who is required to pay the support shall not be liable to third persons for necessaries furnished to the children embraced in the verdict or decree. In any contested case, the parties shall submit to the court their proposed findings regarding the gross income of the father and the mother and the presence or absence of special circumstances. In any case in which child support is determined by a jury, the court shall charge the provisions of this Code section and the jury shall be required to return a special interrogatory similar to the form of the order contained in Code Section 19-5-12 regarding the gross income of the father and the mother and the presence or absence of special circumstances. Furthermore, nothing contained within this Code section shall prevent the parties from entering into an enforceable agreement to the contrary which may be made the order of the court pursuant to the review by the court of child support amounts contained in this Code section; provided, however, any such agreement of the parties shall include a written statement regarding the gross income of the father and the mother and the presence or absence of special circumstances in accordance with subsection (c) of this Code section.

(b) The child support award shall be computed as provided in this subsection:

(1) Computation of child support shall be based upon gross income;

(2) For the purpose of determining the obligor's child support obligation, gross income shall include 100 percent of wage and salary income and other compensation for personal services, interest, dividends, net rental income, self-employment income, and all other income, except need-based public assistance;

(3) The earning capacity of an asset of a party available for child support may be used in determining gross income. The reasonable earning potential of an asset may be determined by multiplying its equity by a reasonable rate of interest. The amount

generated by that calculation should be added to the obligor's gross monthly income;

(4) Allowable expenses deducted to calculate self-employment income that personally benefit the obligor, or economic in-kind benefits received by an employed obligor, may be included in calculating the obligor's gross monthly income; and

(5) The amount of the obligor's child support obligation shall be determined by multiplying the obligor's gross income per pay period by a percentage based on the number of children for whom child support is being determined. The applicable percentages of gross income to be considered by the trier of fact are:

Number of Children	Percentage Range of Gross Income
1	17 percent to 23 percent
2	23 percent to 28 percent
3	25 percent to 32 percent
4	29 percent to 35 percent
5 or more	31 percent to 37 percent

Application of these guidelines shall create a rebuttable presumption that the amount of the support awarded is the correct amount of support to be awarded. A written finding or specific finding on the record for the award of child support that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption in that case. Findings that rebut said presumption must state the amount of support that would have been required under the guidelines and include justification of why the order varies from the guidelines. These guidelines are intended by the General Assembly to be guidelines only and any court so applying these guidelines shall not abrogate its responsibility in making the final determination of child support based on the evidence presented to it at the time of trial.

(c) The trier of fact shall vary the final award of child support, up or down, from the range enumerated in paragraph (5) of subsection (b) of this Code section upon a written finding that the

presence of one or more of the following special circumstances makes the presumptive amount of support either excessive or inadequate:

(1) Ages of the children;

(2) A child's extraordinary medical costs or needs in addition to accident and sickness insurance, provided that all such costs or needs shall be considered if no insurance is available;

(3) Educational costs;

(4) Day-care costs;

(5) Shared physical custody arrangements, including extended visitation;

(6) A party's other support obligations to another household;

(7) Income that should be imputed to a party because of suppression of income;

(8) In-kind income for the self-employed, such as reimbursed meals or a company car;

(9) Other support a party is providing or will be providing, such as payment of a mortgage;

(10) A party's own extraordinary needs, such as medical expenses;

(11) Extreme economic circumstances including but not limited to:

(A) Unusually high debt structure; or

(B) Unusually high income of either party or both parties, which shall be construed as individual gross income of over $75,000.00 per annum;

(12) Historical spending in the family for children which varies significantly from the percentage table;

(13) Considerations of the economic cost-of-living factors of the community of each party, as determined by the trier of fact;

(14) In-kind contribution of either parent;

(15) The income of the custodial parent;

(16) The cost of accident and sickness insurance coverage for dependent children included in the order;

(17) Extraordinary travel expenses to exercise visitation or shared physical custody; and

(18) Any other factor which the trier of fact deems to be required by the ends of justice.

(d) The guidelines shall be reviewed by a commission appointed by the Governor to ensure that their application results in the determination of appropriate child support award amounts. The commission will complete its review and submit its report within four years following July 1, 1989, and shall continue such reviews every four years thereafter. Nothing contained in such report shall be considered to authorize or require a change in the guidelines without action by the General Assembly having the force and effect of law.

(e) The duty to provide support for a minor child shall continue until the child reaches the age of majority, dies, marries, or becomes emancipated, whichever first occurs; provided, however, that, in any temporary or final order for child support with respect to any proceeding for divorce, separate maintenance, legitimacy, or paternity entered on or after July 1, 1992, the trier of fact, in the exercise of sound discretion, may direct either or both parents to provide financial assistance to a child who has not previously married or become emancipated, who is enrolled in and attending a secondary school, and who has attained the age of majority before completing his or her secondary school education, provided that such financial assistance shall not be required after a child attains 20 years of age. The provisions for support provided in this subsection may be enforced by either parent or the child for whose benefit the support is ordered.

(f) The provisions of subsection (e) of this Code section shall be applicable only to a temporary order or final decree for divorce, separate maintenance, legitimation, or paternity entered on or after July 1, 1992, and the same shall be applicable to an action for modification of a decree entered in such an action entered on or after July 1, 1992, only upon a showing of a significant change of material circumstances.

1991 GEORGIA CHILD SUPPORT COMMISSION REPORT

[SEAL OF THE STATE OF GEORGIA]

Superior Courts
of the
Northeastern Judicial Circuit

John E. Girardeau, Judge
P.O. Box 49
Gainesville, Georgia 30503
(404) 535-5374

Dawson Hall, Lumpkin
and White Counties

February 13, 1991

Senator Arthur B. "Skin" Edge, IV
Chairperson
Senate Special Judiciary Committee
121 I State Capital Building
Atlanta, Georgia 30334

Dear Senator Edge:

During the 1989 Session of the Legislature, a child support guideline law was enacted. In addition to substantive provisions, it contained the following requirement:

> "The guidelines shall be reviewed by a Commission appointed by the Governor to ensure that their application results in the determination of appropriate child support award amounts. The Commission will complete its review and submit its report within four years following July 1, 1989, and shall continue such reviews every four years thereafter. Nothing contained in such reports shall be considered to authorize or to require a change in the guidelines without action by the General Assembly having

> the force and effect of law. The Commission shall also submit a report to the House Judiciary Committee and Senate Special Judiciary Committee during the 1991 regular session of the General Assembly. This report shall provide information which will allow these committees to review the effectiveness of the guidelines and, if necessary, revise these guidelines." O.C.G.A. § 19-6-15(d)

This will serve as the Commission's report.

The purposes of child-support guidelines and the purposes sought to be served by the guidelines recommended to the Legislature by the Commission and largely enacted by the Legislature are:

(a) Because of shortfalls in court orders, to increase the amount of child support being ordered;

(b) To make awards more consistent (i.e., treat people similarly situated similarly; and

(c) To improve the efficiency of court processes by enhancing ease of settlement and ease of adjudication.

It has not been possible in the short time since the enactment of the law to do an empirical study on effectiveness, but the Commission has gathered impressionistic information regarding the effectiveness in the form of two surveys, one of lawyers who practice in the family law area, and the other of Superior Court Judges. I am enclosing a summary of each of those surveys. I believe that they speak for themselves so I will not attempt a further summary here, other than to say that from the two surveys conducted it would appear that the guidelines are generally accomplishing the purposes intended.

Also enclosed you will find two articles you may find helpful. There is a good deal of information available on guidelines and the cost of raising children, which I assume the Committee has or has access to.

Finally, I am providing this report without any direction one way or another from Governor Miller. He may or may not want to continue the Commission in its present form or at all. I am providing this information simply for whatever help it may be.

Sincerely,

/s/

John E. Girardeau, Chairman
Child Support Commission

dkm

[Enclosures omitted]

1998 GEORGIA CHILD SUPPORT COMMISSION MAJORITY REPORT

SUPREME COURT OF GEORGIA

STATE JUDICIAL BUILDING

ATLANTA, GEORGIA 30334

CAROL W. HUNSTEIN
JUSTICE

(404) 656-3475

June 25, 1998

The Honorable Zell Miller
Governor of the State of Georgia
301 State Capitol
Atlanta, Georgia 30334

Dear Governor Miller:

Thank you for again giving me the opportunity to serve as Chair of the Georgia Commission on Child Support. The 1998 Commission has completed its review of Georgia's child support guidelines and herewith submits its report and recommendations.

The report is the result of many hours of study, meetings and deliberations. By copy of this letter, I thank each of the Commission members for the time and energy they have devoted to this enormous project.

The Commission members, with the exception of Mark Rogers, concur in the recommendations of the majority report; a copy of the minority report is also attached. The majority report recommends that no changes be made in the child support guidelines at this time. The members do, however, make recommendations for the collection of statistical and economic data in anticipation of the needs of the next Georgia Commission on Child Support.

Unless you have further need of the services of the Commission, we believe this report concludes our review of the guidelines.

Respectfully submitted,

/s/

Carol W. Hunstein, Chair
Georgia Commission on Child Support

cc: Members of the Georgia Commission on Child Support

REPORT TO THE GOVERNOR
FROM
THE GEORGIA COMMISSION ON CHILD SUPPORT

On December 8, 1997, the 1998 Georgia Commission on Child Support was established by Executive Order of the Governor. The Commission was created in accordance with the Family Support Act of 1988, Pub. L. 100-485, October 13, 1988 at Section 103(b); the federal regulations at 45 C.F.R. § 302.56(e); and O.C.G.A. § 19-6-15, which require that the child support guidelines enacted in 1989 be reviewed at least once every four years to ensure that their application results in the determination of appropriate child support award amounts. This report is submitted in compliance with those federal and state requirements.

During the last six months, the Commission has examined in depth the efficacy of Georgia's current child support guidelines. The Commission publicized and held a meeting during which they took testimony from the general public. Three nationally recognized experts advocating various model child support guidelines appeared before the Commission as well as an experienced group of attorneys and judges who regularly apply the current guidelines to determine child support awards. A survey of family law practitioners was conducted. In addition, the Commission examined publications submitted and obtained from a wide variety of sources (see Bibliography.) The members heard many concerns and divergent points of view from those who testified and made presentations; however, our priority had to be and has been the present and future well-being of the children of Georgia.

In its analysis of the current guidelines, the Commission examined the following areas:

1. Economic data on the cost of raising children.

2. Whether the current guidelines result in appropriate child support awards.

3. Available case data relating to the applications of the current guidelines.

4. Whether deviations are limited as required by Federal law.

5. High income families and whether the guidelines are being applied so as to place a $75,000 cap on the gross income used to calculate child support thereby limiting support awards for those children.

6. Low income families and whether the existing guidelines provide adequately for the children.

7. The criteria for deviation from the guidelines when necessary and whether those criteria take into consideration the best interests of the children and are being appropriately applied so that deviations from the guidelines are limited, as required by law.

8. Other methodologies for determining child support. including the "income shares" model, basing awards on net income (Tennessee Model), the Children's Rights Council model, the Massachusetts model and the American Law Institute Model.

The Commission contacted Georgia State University to investigate the feasibility of the University doing a systematic and statistically valid case data analysis. Such a study would require a significant number of graduate students to travel to courthouses throughout the state to research court records. According to Dr. Poister, Professor in the Department of Public Administration and Urban Studies, such a study could not be completed within the tenure of the 1998 Commission which ends July 1, 1998. Without developing a work plan he could not estimate the cost of such a project, but indicated that it would be significant.

Another problem encountered by the members, in their evaluation of Georgia's Child Support Guidelines, was the lack of accurate data on the cost of raising a child in Georgia. The Evaluation of Child Support Guidelines published by the U. S. Department of Health and Human Services points out that most states rely on national data on consumer expenditures. There is a dearth of region-specific research on the cost of raising a child. The report

also pointed out the need to factor in such costly expenditures as child care, post-secondary education and medical insurance.

The Commission was concerned with the public perception of the fairness of the guidelines to both the custodial and non-custodial parent, but again the welfare of our children was our paramount concern. Using the net income of the non-custodial parent to calculate child support is obviously inefficient since varying payroll deductions make it difficult to define. One theorist proposed a model that would not only use net income, but would significantly reduce the percentage of income used to calculate child support. The Commission did not support this approach, which would protect more of the non-custodial parent's income at the expense of the children's welfare.

Preliminary studies indicate that the "income shares" method of computing child support calculates the responsibility of each parent as if they were living in one household. In reality. this method does not take into consideration that the custodial parent is maintaining a separate household, has the child most of the time and has a limited ability to earn additional income. The resulting child support award places undue hardship on the custodial parent and causes a substantial drop in the child(ren)'s standard of living. In almost all cases, the child's standard of living drops significantly after a divorce while the non-custodial parent's standard of living usually rises.

In fact, the American Law Institute's Principles of the Law of Family Dissolution: Analysis and Recommendations. Tentative Draft No. 3. Part II, defines "income sharing" as "marginal expenditure." The marginal expenditure measure of child support is based on economic data which attempt to estimate the percentage of parental net income that is spent on children in intact families. Certain ordinary expenses are omitted from this measure, such as nonfood items like toilet paper and paper towels. Mortgage principal payments are considered savings.

According to the American Law Institute:

> Although the marginal expenditure measure of child support is often articulated as a principle of entitlement for the

> child, conceptually it does not reflect the child's economic claims or needs. The marginal percentage of income spent by a parent on a child in an intact two-parent family bears little relationship to claims that the child might make at family dissolution. The marginal expenditure measure does not hold the child harmless. nor prevent unequal suffering, nor even guarantee a minimum decent standard of living. Thus the most frequent measure of American child support expresses essentially a principle of justice for non-residential parents.

The American Law Institute is advocating a new formula for calculation of child support that is based on the equal living standard measure. This would require that the standard of living of the custodial parent's household be no lower than that of the non-custodial parent.

The State of New Jersey, in its analysis of its child support guidelines attempted to simulate the percentage of parental net income that is spent on children in intact families. In formulating its current guidelines which were adopted in 1997, New Jersey determined that Dr. David Betson's analysis of 1980-1987 Consumer Expenditure Survey and the subsequent analysis performed by Policy Studies, Inc. provide the most current analysis of the *marginal* costs of raising children in *intact* families. However, they recognized that the expenditures of two-household families are different from those of intact households. They reported that the children's standards of living will usually decline significantly when child support awards are based on *marginal* spending. New Jersey's guidelines emphasize that it is very important the children of the state are not reduced to poverty because of the dissolution of their family and that they be afforded the same opportunities as children of intact families of similar means.

The State of New Jersey therefore adopted an extremely complex set of guidelines which required extensive staff training at a significant cost. They are currently working with a software company who has developed software to assist both staff and attorneys in completing worksheets and other documents and calculating child support. New Jersey's experience would certainly

indicate the difficulty and expense of switching to very complex guidelines.

Georgia has consistently used the percentage-of-obligor income model that results in similar awards of child support unless the gross income of the obligor is in the inordinately low or high range. The use of this formula in the higher income range results in a minimization of the differences in the standard of living for the child with that of the obligor. It. prevents gross disparities between the standard of living of the child and non-custodial parent.

Most important, however, the overall indications are that the current guidelines, as written. are consistent and easy to understand and, as being applied, are resulting in appropriate and fair child support awards. Since Georgia is the only state in the union that allows juries to calculate child support awards, the Commission was mindful of the value of maintaining the simplicity of Georgia's guidelines so juries can accurately apply them.

The public hearing held and publicized by the Commission to give the general public an opportunity to express their views on the current guidelines was only lightly attended. Our survey of attorneys at the Family Law Institute Seminar indicated that they believed the current guidelines, in most instances, resulted in child support awards that were adequate for the child and fair to both parents.

It is the consensus of the members, therefore, that the current guidelines are working well and should not be changed at this time. Although the Commission is recommending that Georgia's guidelines remain unchanged at present, we make the following recommendations in preparation for the next commission appointed to review the guidelines:

That the trial courts develop a data sheet to record and transmit to the state statistics on the application of the guidelines. These should reflect the parties' incomes, the percentages being awarded, the consistency and uniformity

of the awards and frequency of deviation from the guidelines and the reasons for deviations.

That funding be sought from the Federal government to gather this data and, also, to analyze the actual cost of raising a child in a single parent home in Georgia.

The members of the Commission come from many different backgrounds (child support staff, private attorneys, a legal aid attorney, judges, legislators, custodial parents, non-custodial parents, an economist and an academician), and their experience with Georgia's Child Support Guidelines has been from many different vantage points. This diversity has allowed the members to look thoroughly at the guidelines and the many different ways they affect the lives of Georgians. With a single exception the members of the Commission are in complete agreement as to the. fairness and merits of the present guidelines.

We are honored to have been given this opportunity to serve the Governor and the citizens of the State of Georgia. The importance of this study and its impact on the future of the children across this State made it an awe-inspiring task.

The 1998 Georgia Commission on Child Support submits this report, along with supporting documents, for your consideration.

Respectfully submitted,
/s/
Carol W. Hunstein
Chair of the Georgia Commission on Child Support

NOTE: Although Commission member Clay Land concurs with the ultimate conclusion of the Commission that the current guidelines are working well and should not be changed at this time and further agrees with the recommendation that the State should improve its court data collection system to include the collection of data that would be relevant to future evaluations of the guidelines, he does not necessarily agree with each statement contained in the rest of the report.

[Bibliography omitted]

Minority Report
of the Georgia Commission
on Child Support

Submitted to Georgia Governor Zell Miller

July 1, 1998

by R. Mark Rogers

Introductory Comment

Georgia has a peculiar model of child support guidelines. Reasonably, however, Georgia's guidelines are based on a percentage of income that varies according to the number of children. But oddly, just the non-custodial parent's income is considered and, even stranger, the percentage is fixed for all levels of income and on a before-tax basis. In complete contrast to all known economic studies on consumer spending behavior, application of Georgia's guidelines leads to the curious result that a non-custodial parent's child support obligation rises as a share of after-tax income. In turn, after-tax obligations become bizarrely high. For example, a before-tax obligation for two children of 25 percent of obligor income translates into about a 40 percent after-tax obligation for moderately high incomes.

Only about a dozen states use a percent of obligor-only income model. Even fewer use one on a before-tax basis as Georgia does. Additionally, some of these states use an obligor-only model that severely restricts application to a ceiling level of child support award. Georgia is one of less than a handful of states that use such a simplistic, before-tax, income-of-obligor-only model as it does. Notably and in contrast, about thirty-five states base their child support guidelines on both parents' income and have presumptive awards that decline as percentages of combined income and take into account special needs at the poverty level. Curiously, the Federal Advisory Panel on Child Support recommended against

using the type of guidelines that Georgia adopted in 1989 and currently uses. Curiously, Georgia's guidelines go against the recommendations of those conducting the original economic study allegedly underlying Georgia's guidelines. In contrast to popular myth, in most situations Georgia's guidelines have been shown statistically to leave the non-custodial parent with a lower standard of living than the custodial parent household.

The Minority agrees, as discussed below, with the vast majority of attorneys surveyed for this Commission that Georgia's child support guidelines should be changed.

Summary

The Georgia Commission on Child Support convened on February 13, 1998, after appointment by Governor Zell Miller in December 1997, in order to initiate a review of Georgia's child support guidelines. This review was begun with the intent to comply with Federal government requirements as pertaining to the State's receipt of Federal funds in exchange for the State's agreement to comply with Title 45 of Code of Federal Regulations, Section 302.56.

In order for the State to satisfy requirements for receipt of Federal funds, the State is given one broad objective and two specific requirements for its four year review of the State's child support guidelines. The broad objective is that the State is required once every four years to review, and revise if appropriate, the State's child support guidelines to ensure that their application results in the determination of appropriate child support award amounts. That is, the states must review the guidelines in terms of their "appropriateness." The two specific requirements are that the State must (1) consider economic data on the cost of raising children, and must (2) analyze case data on the application of and deviations from the guidelines. Georgia Governor Zell Miller has appointed the Georgia Commission on Child Support to act for the State in order to meet these Federal regulatory mandates.

Experts Testify That Georgia's Guidelines Are Not Appropriate

- Expert testimony by Williams and Bieniewicz shows custodial parents frequently receive large amounts of hidden alimony under the guise of child support in Georgia.

- Expert testimony by feminist advocate Entmacher backed an evaluative method that shows custodial parents generally have a higher standard of living than non-custodial parents based on Georgia's guidelines.

For the broad objective—the one of "appropriateness," all three economic experts directly or indirectly stated that Georgia's presumptive guidelines are excessive at moderately high and high-income levels.[12] All three experts stated that while the guidelines are inadequate at poverty levels of income in terms of covering child costs, all experts stated that the burden on the obligor is excessive and inappropriate. Separately, an economic study was conducted and presented by the author of this Minority Report. This study on Georgia's presumptive child support obligations indicates that an application of the guidelines generally results in an inappropriate, significantly higher standard of living for the custodial parent household than for the non-custodial parent.[13] The result is that Georgia's guidelines are inappropriately high in many, if not most, income situations. This study also found that Georgia's guidelines go against mainstream economic research and data. Earlier expert witnesses corroborated this author's

[12] The three guests presenting expert economic testimony were Robert Williams, Don Bieniewicz, and Joan Entmacher. Robert Williams is director of Policy Studies, Incorporated of Denver Colorado and is the developer of the income shares child support model used by about 35 states. Don Bieniewicz is a policy consultant with Children's Rights Council. Joan Entmacher is a legal analyst with National Partnership for Women and Families (formerly Women's Legal Defense Fund).

[13] The author, R. Mark Rogers, is author of *Handbook of Key Economic Indicators, 2nd Ed.*, McGraw-Hill (1998). The study cited is Appendix material, "How Wisconsin-Style Child Support Guidelines Violate Mainstream Economic Theory and Empirical Research: Georgia as an Example," working paper presented to Georgia Commission on Child Support, June 4, 1998.

research that Georgia's guidelines violate mainstream economic theory and data. Experts testified that there are no economic studies that show that child costs rise as percentage of after-tax income as Georgia's do. Essentially, Georgia's guidelines as applied to a wide income range are without any economic basis. All experts testified that the proper award cannot be determined without both parents' income as part of the presumptive formula and reflecting actual costs to be proportioned. Essentially, the evidence presented to the Commission was that Georgia guidelines do not result in appropriate child support award amounts and that the Commission—in order to meet Federal requirements for funding—should recommend changing the guidelines as necessary.

Case Study Requirement Not Met

For the first specific requirement of the guideline review related to reviewing data on child costs, the Commission received testimony from three expert witnesses on the national cost of raising children. However, it is not clear that the Federal requirement regarding review of cost data was satisfied, pending whether the Federal regulation requires state-specific data or not. Additionally, the Commission did not obtain data nor did it review any studies on the cost of raising children in high-income situations. The Commission is not in a position to determine if changing the guidelines is appropriate for high income situations. For the second specific requirement that is in regard to case studies, the Commission did not obtain case data and therefore has not satisfied the requirement to evaluate application of and deviations from guidelines based on case data.

Essentially, the Georgia Commission on Child Support has not met Federal requirements to continue receive Federal funding without penalties imposed. Additionally, 45 CFR Section 302.56 states specific requirements regarding State implementation of child support guidelines into statutory law. Georgia still does not comply in at least two respects and the Commission is obligated to recommend changes to the Georgia Legislature in order to comply and to qualify for continued Federal funding.

Current Guidelines Still Do Not Meet Federal Regulatory Requirements

The first specific requirement with which Georgia statutory law does not comply is that the guidelines must be based on specific descriptive and numeric criteria and result in a computation of the support obligation. This is required under 45 CFR Section 302.56(c)(2). Georgia's use of a range of percentages does not result in a singular presumptive award and violates this requirement. All three expert witnesses stated that Georgia is in non-compliance on this matter. The intent of this regulation is to reduce uncertainty regarding the likely outcome of any hearing regarding child support awards and to treat all similarly situated parents equally. Georgia's use of a range of percentages is in contrast to both intents—a parent that is a party in a child support case does not know where within the guidelines a particular judge may choose for the presumptive award and there is no guarantee that judges will treat all similarly situated parties equally.

Second, Federal regulations under 45 CFR Section 302.56 require that the State create presumptive awards that are rebuttable. Georgia's statutory presumptive guidelines do not have a published basis for rebuttable presumption. The criteria underlying the presumptive guidelines are unknown and cannot be rebutted. One does not know what weight various types of child costs are given in the presumptive guidelines. For example, how much of the guideline award is presumed to be for a child's educational expenses or perhaps medical expenses? How would one compare one's own child's possible private school expenses against the unstated school expense implied in the presumptive awards? The same question applies for any other category that a parent might want to rebut. This lack of published basis for rebuttable presumption violates 45 CFR Section 302.56(f) and (g).

Original Study Underlying Georgia Guidelines Uncovered—the Guidelines Are Not What Was Recommended and Go Against the Study

A surprising—if not shocking—outcome of research conducted for presentation to the Commission just prior to its conclusion is that Georgia's presumptive guidelines conflict with the original

economic study and policy recommendations by researchers who developed Wisconsin's model of child support guidelines—the percent of obligor's gross income model—that Georgia later adopted. Apparently, the original sponsors of Georgia's guidelines either were misled by special interest advocacy groups about these guidelines or the sponsors misled the Georgia Legislature regarding Federal recommendations and underlying studies. Georgia's presumptive guidelines not only should be changed but should never have been enacted in their current form which conflict with Wisconsin's original research and mainstream economics in general.[14]

The impact of continuing with the current child support guidelines result in a continuation of bad public policy with negative effects on the welfare of Georgia's children. The Majority has focused almost solely on "adequacy" of award from a custodial parent's perspective, emphasizing maintaining a child's pre-divorce standard of living. Almost no attention has been given to the impact of the guidelines on the standard of living of the non-custodial parent and that of the child when with the non-custodial parent nor the long-term impact on the child when application of the guidelines interfere with the non-custodial parent's ability to contribute to the child's emotional development. As will be discussed below, current guidelines create incentives that are adverse to the child's development. Excessive awards are shown to not be better for the child but worse in the long-run. The Federal Advisory Panel on Child Support was aware of these negative effects and recommended against the guidelines that Georgia enacted into law in 1989 and are still law with only trivial changes since.

Recommendations

In summary, the Majority Report's recommendation for "no change" in Georgia's presumptive guidelines that are based only on obligor gross income leaves Georgia obligors with excessive

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[14] See *Register*, State of Wisconsin, January 1987; Institute for Research on Poverty, University of Wisconsin-Madison, 1981; and R. Mark Rogers, "How Wisconsin-Style Child Support Guidelines Violate Mainstream Economic Theory and Empirical Research: Georgia as an Example," working paper presented to Georgia Commission on Child Support, June 1998.

and inappropriate child support awards in most case circumstances. The State also is not in compliance for receipt of Federal funds as a result of the Commission not taking necessary actions regarding cases studies and not recommending guidelines that are appropriate as reflecting economic data. Federal regulations require that the guidelines result in an appropriate award. The first recommendation is that the State should comply with the Federal requirement for a case study—a study of cases actually obtained from Courthouse records and from Child Support Enforcement or contractor agencies. Additionally, in order for the State of Georgia to comply with Federal regulatory requirements for an appropriate award—defined by the Minority as reflecting economic data, this Commission should recommend that child support guidelines be enacted into law that are:

- Based on both parents' income,
- Based on after-tax income,
- Based on percentages of income that decline as after-tax income rises,
- Inclusive of a self-support reserve so that a parent's basic needs can be met,
- Inclusive of formula adjustments for differences in how much time each parent has with the child rather than based on a single assumption for "standard" visitation,
- A single-value percent for each combined parents' income level rather than a range of percentages, and
- Based on published cost estimates for expenditure components of child costs for rebuttal purposes.

As a final note for the summary, the recent signing into Federal law of the Deadbeat Parents Punishment Act, on June 24, 1998, creates federal felony punishment for arrearages of child support based on a Federal presumption that the state ordered child support is correct. Given the excessive and oppressive nature of Georgia's current child support guidelines, it is unconscionable to leave Georgia's guidelines unchanged, thereby creating a class of federal felons—non-custodial parents unable to pay all of court ordered child support due to circumstances not of their making.

This report will next detail the Minority's disagreement with Majority positions.

Georgia's Presumptive Guidelines Do Not Reflect Economic Reality, Generally Are Excessive, and Are Not "Appropriate"

The primary task of this Commission is to determine if the presumptive guidelines are "appropriate."[15] This is a multifaceted task. It involves more than the focus of the Majority--that of seeking only to look at whether child costs are covered for the custodial household. (1) The guidelines for presumptive awards should reflect the reality of known economic spending patterns based on well-accepted economic theory and data—covering typical expenditure patterns (which in intact families is inclusive of both concepts of "covering costs" and staying within "ability to pay." (2) Appropriateness involves making sure that the burden of caring for children financially is shared equally by each parent. "Appropriate" means having taken into account not just whether the presumptive award at least covers child costs as experienced by an intact family but also whether the obligor parent can afford to pay the presumptive award, whether the burden is shared equally (with burden being defined as according to each parent's available income).

Expert testimony show that Georgia's guidelines only fare well in terms of covering costs to the custodial household. Otherwise, Georgia's presumptive child support guidelines are not appropriate because the guidelines do not reflect economic data patterns and because the burden of child support falls disproportionately on the obligor, often resulting in hidden alimony for the custodial parent. For detail, what economic data do Georgia guidelines contradict?

Mainstream Economic Theory and Empirical Data on Key Characteristics of Consumer Spending

According to mainstream economic theory and data, what are consumer spending characteristics against which Georgia's

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[15] From 45 CFR Section 302.56(e) [10-1-95 edition], "The State must review, and revise, if appropriate, the guidelines established under paragraph (a) of this section at least once every four years to ensure that their application results in the determination of appropriate child support award amounts."

presumptive guideline obligations for the non-custodial parent should be compared?

Modern economic theory has been developed over for perhaps the past 150 years. Over the past 100 years, theory of consumer behavior has been a fundamental focus of economic analysis and certain tenets have become key to understanding and analyzing consumer behavior. Certain fundamentals of consumer behavior have become accepted by both liberal and conservative economists alike based both on accepted theory and respected empirical analysis. A renowned macroeconomic theorist and educator of the 1960s and 1970s, Gardner Ackley, succinctly describes these key facets of consumer spending behavior.

> At various times over the past 100 years, and in various countries, comparative studies have been made of family budgets. For a group or "cross-section" of families at a given time, data have been collected regarding size and disposition of income. ... These data also ordinarily reveal the *total expenditures* [emphasis added is original] on all objects (or the savings) of the families covered by the study. Almost without exception budget studies show a relationship between family income and total family consumption like that which Keynes postulated for the total economy: low-income families typically dis-save; high-income families typically spend less than income. As one moves along the distribution from lower to higher incomes, average consumption rises, but by less than income; and the higher the income the less the rise in consumption from a further increment of income. The MPC [marginal propensity to consume—the tendency of consumers to consume a given proportion out of *additional* income] is positive, less than one, and declines as income rises.[16]

In a nutshell, there is a long history of economic studies that shows that low income families do not have enough income to cover expenses without public assistance. Second, these studies

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[16] Gardner Ackley, *Macroeconomic Theory*, The Macmillan Company, New York, Collier-Macmillan International Edition, Third Printing, 1973, p. 221.

show that as income rises, the percentage of the additional income that is spent declines, leading to a decline in the average of total income that is spent as income rises.

Georgia's Wisconsin-Style Presumptive Obligations Rise as a Percentage of Rising Net Income

How do Georgia guidelines stand in contrast to known economic data? Georgia's presumptive child support awards are based on obligor-only gross income. However, it is after-tax income from which an obligor must pay the support and meet the obligor's own living expenses. Chart 1 below shows after-tax income for a single, non-custodial parent, not entitled to child deductions or exemptions (as required by IRS regulations) and resulting presumptive child support obligations based on mid-point percentages of Georgia's presumptive range of percentages, according to the number of dependents, and the presumptive award as a percentage of obligor's net income before "add-ons." After-tax income is gross income less Federal and Georgia personal income taxes, Social Security taxes, Medicare taxes, plus earned income credits. It is assumed that the obligor has no child deductions and no child exemptions and uses standard deductions.

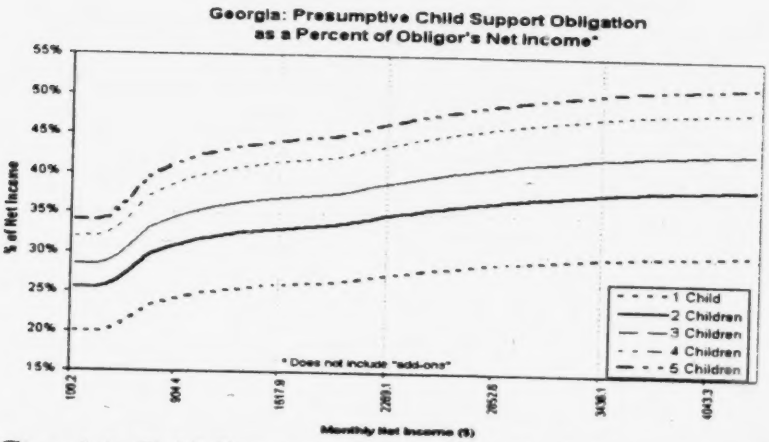
As shown in Chart 1 below, a key economic characteristic of Georgia's presumptive mid-point awards is that they rise dramatically as a percentage of obligor net income as gross and net income rise. For an obligor paying support for one child, the mid-point presumption rises from 20 percent of net income at below poverty level income to over 30 percent for monthly net income of $4,043 ($6,100 monthly gross). For the frequently occurring case (for divorce-related rather than unwed situations) of a two-child obligation, the presumptive mid-point obligation rises from 25.5 percent of net income at minimal income levels to 38.5 percent for $4,043 monthly net income ($6,100 monthly gross). These figures do not include "add-ons."

Statutorily allowed "add-ons" boost the after-tax presumptive obligation. For example, for an obligor making $2,500 gross monthly with an add-on of $75 per month for medical insurance, the two-child support obligation would rise from $638 to $713 per month and the net income obligation would rise from 33.5 percent

without medical insurance to 37.4 percent. For $3,000 in monthly gross income, the same respective net income percentage would rise from 34.6 percent to 38.0 percent.

Why is this divergence significant—that Georgia's presumptive percentages rise as a share of obligor net income in contrast to mainstream economic evidence that spending declines as a percentage of rising net income? First, a presumptive award that rises as a share of net income, at some point, leads to an excessive child support award as income rises and includes portions that are hidden alimony. Second, the importance is that because personal consumption declines as a percentage of rising net income, an obligor parent's child support obligation ***cannot*** be determined without the custodial parent's income as part of the equation. It is the combined income of the parents that determines which percentage that the family spends on children and what the resulting family expenditure level on children is. It is this level of expenditures on children that properly determines the share that should be allocated to the non-custodial/obligor parent.

Chart 1:



Georgia's Guidelines on a Before-Tax Basis Ignore Differences in Tax Treatment for Custodial Versus Non-custodial Households, Thereby Treating Them Differently in Their Contribution of Support Related to Their Ability to Support Children

Georgia's Wisconsin-type child support guidelines assume that both parents are equally capable of support based on gross income and based on family spending studies—in contrast to non-intact family studies. Are these valid assumptions as indicated by current tax law and by changes in tax law since these guidelines were derived?

Based on differences in treatment for custodial versus non-custodial parents on Federal and state income taxes, use of gross income as the basis for the determination of child support obligations is inappropriate. The differences in tax treatment are quite substantial, leaving the non-custodial parent with a significantly lower ability to support children relative to the custodial parent at equal levels of gross income. Based on the fact that it is after-tax income that determines a parent's ability to support children, and that both parents have an equal responsibility to support their children, use of gross income for determination of child support awards leads to an excess burden on the non-custodial parent.

Differences in Tax Treatment Between Head of Household/Custodial Parent Versus Single-Taxpayer/Non-custodial Parent

From Federal form 1040 from the Internal Revenue Service for calendar tax year of 1997, the divergent treatment of custodial and non-custodial parents is substantial:

- The standardized deduction (line 35, Form 1040), for a single person (the non-custodial parent) was $4,150 compared to $6,050 for a head of household taxpayer (the custodial parent). This is a bonus of $1,900 in deductions for the custodial parent.

- The custodial parent only is able to claim the dependent exemptions as a legal right (lines 6c and 37, Form 1040). The 1997 value of each dependent exemption was $2,650.

- For low income and moderately low income working parents, custodial parents receive dramatically more favorable

treatment than do non-custodial parents in terms of the size of earned income credits under Federal income tax law.

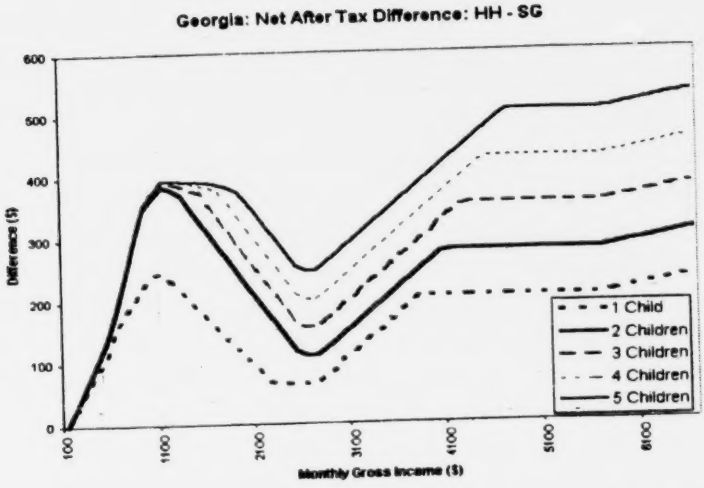
The earned income credit was as much as—

- $332 if you did not have a qualifying child,
- $2,210 if you had one qualifying child, or
- $3,658 if you had more than one qualifying child.

As with Federal tax code, Georgia personal income tax law gives custodial parents significant exemptions that non-custodial parents generally do not get. As noted earlier, also the marginal tax rate increases for head of household taxpayers kick in at higher income threshold levels than for single, non-custodial parents.

Chart 2 summarizes the difference in tax code treatment of custodial parents (labeled head of household—HH) to that of non-custodial parents (labeled single taxpayer—SG). The horizontal axis is gross income for both parents and the vertical axis is the net income advantage that the custodial parent has for each level of gross income. It shows the after-tax income of the custodial parent minus the after-tax income of the non-custodial parent. Taxes are Federal and Georgia personal income taxes, Medicare, and Social Security taxes. Earned income credits are added. Standard deductions are used. Chart 2 shows a dramatic after-tax advantage for the custodial parent. The first "hump" is primarily due to the earned income credit that the custodial parent receives. The rising advantage on the right two-thirds of the chart are due to differences in marginal tax rates. Deductions and exemptions also boost the overall level for custodial parents. Use of gross income for guidelines ignores the advantage that custodial parents receive from preferential tax treatment. This advantage typically is worth several hundred dollars in net income per month.

Chart 2:



Tax Code Has Shifted Significantly to Custodial Parent's Favor Since Georgia's Guidelines Were Originally Designed

Georgia's child support guideline model was based on economic research and tax code in the late 1970s and up to a 1982 study by Jacques Van der Gaag working for the University of Wisconsin's Institute for Research on Poverty. Georgia's guidelines were taken directly from Wisconsin's research. Even if the guidelines were appropriate in 1982, they certainly have not kept up with tax code changes that have since favored the custodial parent. Since 1982, some of the key legislation are:

- **1997:** Most recently, the Taxpayer Relief Act of 1997 provides a $500 ($400 for taxable year 1998--$500 per year thereafter) tax credit for each qualifying child under the age of 17.

- **1993:** The Omnibus Budget Reconciliation Act of 1993 added two new marginal tax rates that affect higher-income individuals. First, there is a 36-percent rate applicable to taxpayers with taxable incomes (for calendar tax year 1993) in excess of $140,000 for married individuals filing joint returns, $115,000 for unmarried individuals filing as single, and $127,500 for unmarried individuals filing as head of household. Starting in 1995 these income thresholds were

indexed for inflation. Notably, these rates were not in effect when the Wisconsin-style guidelines were implemented and there now are differing thresholds for custodial versus non-custodial parents.

- **1986:** The Tax Reform Act of 1986 had a notably divergent impact on custodial versus non-custodial taxpayers. Most of the tax code changes were effective in 1988 although there was a transitional period in 1987 for some of the tax code changes. There was a clear divergence in treatment between single taxpayers and head of household taxpayers. Prior to the change, for the 1986 tax-rate schedule, the minimum 11-percent bracket started at $2,480 in taxable income for both categories—that is, the zero bracket amount (ZBA) was the same for custodial and non-custodial parents. This also is the standard deduction (taxpayers pay a zero tax rate on this amount of income). With the implementation of the new tax code, the standard deductions for 1988 for heads of household and for single individuals diverged significantly at $4,400 and $3,000, respectively.

  The Act also boosted the earned income credit substantially with the rate and base of the earned income credit to 14 percent of the first $5,714 of an eligible individual's earned income with phase-out income levels also raised. With these changes combined, the 1986 Act benefited a custodial parent substantially more than a non-custodial parent. Based on wage and salary gross income, the income tax threshold in 1988 for a single individual taxpayer was $4,950, compared to $3,760 under prior law—a difference of $1,190. Based on the same type of income, the income tax threshold in 1988 for a head of household taxpayer with one dependent was $12,416, compared to $8,110 under prior law—a difference of $4,306. For a head of household with three dependents, the difference was $5,566.

- **1984:** The Deficit Reduction Act of 1984 significantly affected domestic relations taxation in the areas of alimony, property divisions and transfers, and dependency exemptions. For custody decrees subsequent to 1984, this act allocated the dependency exemption to the custodial parent in all cases

unless the custodial parent signed a written declaration each year that the non-custodial could claim the dependency exemption. Previously, the parent paying over half of a child's support could claim the exemption regardless of custodial status. In non-intact families, the person who previously could claim this exemption typically was the non-custodial parent prior to 1985. This change in tax code was subsequent to when Wisconsin-style child support guidelines were first derived based on obligor gross income in 1981-82 and earlier.

Standard of Living Comparisons—After-Tax, After-Child Support

As mentioned earlier, Georgia's guidelines do not take into account whether the obligor actually has the ability to pay the presumed award. This is especially notable at low income levels. Chart 3 compares for both non-custodial and custodial parents their after-tax, after-child support incomes with the poverty level subtracted for each. The poverty level varies according to the number of children. The chart is based on the assumptions of standard taxes, credits, deductions, and exemptions and that the child support is actually paid. This latter assumption is questionable at low income levels. The two-child case is shown as an example. All data are for 1997. Two lines are shown for the custodial parent—one such that the custodial parent has the same gross income as the non-custodial parent and one such that the custodial parent has only 70 percent of the gross income of the non-custodial parent.[17]

It is quite clear that at low income levels the non-custodial parent is pushed below the poverty level (the horizontal axis) and cannot afford to pay child support and meet basic needs. Given the alternatives, the non-custodial parent must purchase minimal food and clothing and come up short on child support. Because of enforcement practices, these low income non-custodial parents are forced into an underground, cash economy to survive. Georgia's unrealistic guidelines drive these parents out of the official

[17] For full detail on the standard of living comparison, see R. Mark Rogers, "How Wisconsin-Style Child Support Guidelines Violate Mainstream Economic Theory and Empirical Research: Georgia as an Example."

economy and children get less child support than if the guidelines were realistic and the non-custodial parent stayed in the reported economy. Additionally, these low income parents no longer get to see their children for fear of being arrested.

Certainly at low income levels, as shown in the chart, custodial parents also have a difficult time financially. However, custodial parents do qualify for government assistance programs that non-custodial parents do not qualify for.

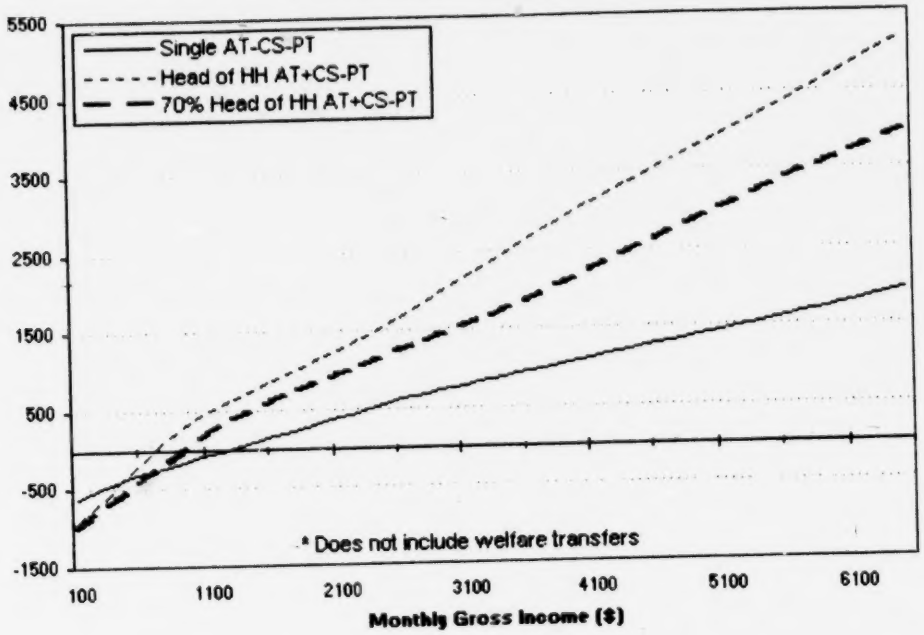
Custodial Parents Generally End Up with a Higher Standard of Living than the Non-custodial Parents

A standard of living comparison is not a comparison of child costs. This type of comparison necessarily at some point is inclusive of alimony since traditionally case law has defined child support in terms of needs and costs and alimony in terms of standard of living. Nonetheless, a comparison of after-tax, after-child support compared to a baseline of the poverty level is a useful evaluation of the impact of the transfer of income through child support. Chart 3 not only shows payment difficulties of the obligor at low income levels but also shows that at higher income levels, the payment of child support leads to an increasingly higher level of above poverty income to the custodial parent than the non-custodial parent. This method of comparison actually has been advocated by a "women's group"—the National Partnership for Women and Families (formerly Women's Legal Defense Fund)—to evaluate child support guidelines.

Based on these comparisons, Georgia's guidelines are excessive in most instances. A comparison of these numbers in ratio form gives these results. That is, the custodial parent generally has more multiples of poverty level income than the non-custodial parent. Based on Georgia's guidelines—even though both parents are worse financially after divorce—the custodial parent generally has a higher standard of living than the non-custodial parent. The relative levels of each parent's gross income and the number of children do affect this outcome. Essentially, one cannot say how the standards of living compare without knowing both parent's income—something that Georgia's guidelines do not address.

Chart 3:

After-Tax, After-Child Support Income Minus Poverty Threshold: Two Children*



Expert Testimony Shows Georgia Guidelines Give Custodial Parents Large Amounts of Hidden Alimony in Many Cases

Dr. Robert Williams of Policy Studies, Incorporated, Denver, Colorado presented testimony and data from income shares models showing that in moderate and high income cases the custodial parent receives large amounts of hidden alimony through child support payments, depending on the custodial parent's income relative to that of the non-custodial parent. For situations such that the custodial parent has from one half to equal net income of the non-custodial parent, the hidden alimony can be:

Hidden Alimony as a Percent of Georgia Child Support Awards

- One child: up to 49 to 53 percent hidden alimony
- Two children: up to 43 to 47 percent hidden alimony
- Three children: up to 40 to 44 percent hidden alimony.

The lower figure is the percent that is hidden alimony with custodial parent income at half that of the non-custodial parent. The upper is for equal net income. Figures are for the $5,000 per month level in net income for the non-custodial parent. Expert testimony from Don Bieniewicz stated that the share of hidden alimony is likely to be higher since Williams' income share model is not a true marginal cost model and include some aspects of alimony.

Georgia Guideline Violations of Economic Data—Summary

- Expert testimony and evidence presented show that Georgia's presumptive awards do not reflect economic reality—no economic data support the guidelines that Georgia uses over an extensive income range that result in an obligation that rises as a share of after-tax income.

- In general, the guidelines place a disproportionate share of the burden of child support on moderate income non-custodial parents and at moderately high and high income levels, the non-custodial parent actually pays large amounts of hidden alimony to the custodial parent under the guise of child support.

- At low income levels, the guidelines do not recognize self-support needs of the non-custodial parent.

In most income situations, the custodial parent ends up, after child support, with a much higher standard of living than the non-custodial parent—even when the custodial parent earns a moderately lower gross income.

Origin and Background of Georgia's Percent of Obligor Model (Wisconsin-Style)

Georgia's child support guidelines are based on those developed for the State of Wisconsin. On what were their guidelines based and were the laws implemented according to economic research? Wisconsin regulatory code specifically points to the origins. Chapter HSS 80 of the Wisconsin state *Register*, January 1987, No. 373, is entitled, "Child Support Percentage of

Income Standard." The Introduction to this chapter explains the alleged academic underpinnings for this particular model of determining a non-custodial parent's child support obligation. As seen in Section HSS 80.01:

> The percentage standard established in this chapter is based on an analysis of national studies, including a study done by Jacques Van der Gaag as part of the Child Support Project of the Institute for Research on Poverty, University of Wisconsin, Madison, entitled "On Measuring the Cost of Children," which disclose the amount of income and disposable assets that parents use to raise their children.[18]

Clearly, a review of Van der Gaag's study is necessary in order to fully evaluate the economic appropriateness of percent of obligor income guidelines.

Van der Gaag's Definition of Child Costs

Van der Gaag's definition of child costs diverges sharply from common definitions that generally are tied to how much families with children actually choose to spend on children. His study's definition begins with one-child costs being based on how much income a one-child couple must be compensated in order to be equally well off economically as without the child. From Van der Gaag, "Thus the question is: How much income does a couple with one child need, to obtain the same (pre-specified) level of economic well-being as a childless couple?"[19] This table is viewed as the basic share that children are entitled to of their parents' income.

The State of Wisconsin took Van der Gaag's estimates as baseline cost estimates and then adjusted them downward slightly. The primary reasons for doing so follow:

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[18] Wisconsin, State of. *Register*, January 1987, No. 373, Chapter HSS 80, page 316-1.

[19] Jacques van der Gaag, "On Measuring the Cost of Children," Child Support: Technical Papers, Volume III, SR32C, Institute for Research on Poverty, Special Report Series, University of Wisconsin, 1982, pp. 18.

> There were several arguments for adopting lower than average percentages for setting support. First, additional earnings capacity of the custodial parent. Second, the non-custodial parent's costs for normal visitation.[20]

The State of Wisconsin, based on Van der Gaag's table and subsequent adjustments, thereby presumes that the child support obligation for the non-custodial parent is as follows:

Number of Children	Percentage of Obligor's *Gross* Income
1	17 percent
2	25 percent
3	29 percent
4	31 percent
5 or more	34 percent.

One of the chief criticisms of the Van der Gaag's cost estimates is brought up by Van der Gaag himself. The cost estimates do not take into account any "utility" that children give to the parents. Essentially, his cost estimates are based on a definition such that all that matters is economic well-being of the parents—as though that is the only consideration used to determine whether to have children or not. His definition leads to an overstatement of child costs. Also, he did not credit the non-custodial parent for time that the child is in the non-custodial parent's custody.

Additionally, the bulk of the studies reviewed by Van der Gaag are for low income families and the studies ignore the impact of government transfers to subsidize child costs. As noted, the baseline income for the families studied is $12,000 for Van der Gaag's table comparing child costs as a percentage of gross income. The low income base would necessarily lead to high percentages for child costs since necessities would take up almost all and in many cases more than all income. Dependence on subsidies also would boost child costs as a share of income.

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[20] Ada Skyles and Sherwood K. Zink, "Child Support in Wisconsin: Income Sharing as a Standard of Law," paper presented at the Women's Legal Defense Fund Conference at The Aspen Institute, September 15-17, 1986, p. 4.

The adjusted percentages were adopted by the State of Wisconsin in 1983 as guidelines to be used in an advisory capacity and as a rebuttable presumption for child support obligations in 1987.[21]

Wisconsin's Guidelines Were Never Intended by the Original Researchers to Apply to Situations Other than Low Income or Low, Minimal Benefits

Wisconsin's child support guidelines originally were intended to be applied to only very limited circumstances. The original concept underlying Wisconsin's child support guidelines based on academic recommendations was to exempt some income, to require the custodial parent to pay for any difference between guaranteed benefits and what the non-custodial parent could pay, and to cap the benefits at a low level so that the "tax" was regressive for the obligor. These guidelines were *never* intended by those conducting the *original* studies to apply to anything other than low income levels or for other income levels but to obtain minimal benefits for the child as guaranteed by the state.

Based on early papers providing the technical foundations for Wisconsin's child support guidelines, the guidelines were originally developed for only welfare situations (note that the child support obligation is described as a "tax" since the intent was for automatic with-holding as with other taxes). The intent was for both parents' income to be part of the formula and that there be a maximum level of benefits (child support).[22]

Further corroborating these original intentions, the following comes from an early technical paper described the child support "tax" as a proportional tax—but only as applied to low benefit situations and only up to the guaranteed public benefit to the child:

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[21] Irwin Garfinkel, "The Evolution of Child Support Policy," *Focus*, Vol. 11, No. 1, Spring 1988, University of Wisconsin-Madison, Institute for Research on Poverty, p. 13.

[22] Institute for Research on Poverty, University of Wisconsin-Madison. "Documentation of the Methodology Underlying the Cost Estimates of the Wisconsin Child Support Program," Child Support: Technical Papers, Volume III, SR32C, Special Report Series, 1982, pp. 143-144.

> A proportional tax rate structure is one in which the tax rate on all income is identical. A regressive tax rate structure is one in which the tax rate declines as income increases while the tax rate increases as income increases in a progressive tax.
>
> Because the child support tax will not apply to income in excess of the amount required to finance the public benefit, on income above this maximum the child support tax structure can be said to be regressive. But our concern here is with the tax rate structure up to this maximum [with a proportional tax being implemented as long as the public benefit is not exceeded].[23]

It is quite clear that the original concept of Wisconsin's child support plan included low income exemptions, ceilings on income subject to the guidelines, and was based on a modest level of publicly guaranteed benefits to the child with the state's objective as recovery of the costs of those benefits from both parents as much as was practical. These guidelines were never intended to be extended beyond low income situations or beyond low benefit guarantees. These guidelines were developed for a very narrow set of economic circumstances but have since been extrapolated to apply to non-welfare cases and to high income/high award cases without the benefit of any substantiating economic theory or empirical evidence to support such application in these extended economic circumstances.

The Original Intent of Wisconsin's Guidelines—Based on Van der Gaag's Model—Was for True Income Shares and Custodial Time Adjustments

Current practice Wisconsin-style guidelines focus on obligor income only. However, the original guidelines that were advisory in nature were intended to provide guidelines for family income to be contributed for child support. Specifically, in the study, the guideline percentages were in reference to percentages to be

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[23] Institute for Research on Poverty, University of Wisconsin-Madison. *Child Support: A Demonstration of the Wisconsin Child Support Reform Program and Issue Papers*, Volume II, SR32B, Special Report Series, 1981, p. 51.

applied to family income. Both parents were intended to pay to support the children.

The originally intended implementation of Wisconsin-style guidelines was most clearly described in a memorandum by the Secretary of Wisconsin's Department of Health and Social Services upon the initial use of these guidelines in an advisory capacity in 1983 as allowed by 1983 Wisconsin Act 27 (in contrast to a later rebuttable presumption). The following referenced "standard" is the guideline percentages then in effect and continuing to this day in Wisconsin as a rebuttable presumption for child support obligations. These guidelines essentially were duplicated by Georgia but with the addition of a range around Wisconsin's percentages and with the one-child obligation arbitrarily boosted 3 percentage points. The memorandum was a set of instructions to the Wisconsin judiciary on how to apply the advisory guidelines. The memorandum acknowledges that the presumptive percentages were based on studies of intact families with the studies using income equivalence to define child costs—as in Van der Gaag's table—and were for a family's obligation.

> The standard determines the amount both parents are expected to contribute to their child's care. Therefore, if a child is in the physical care of someone other than a parent, the standard may be used to determine the amount each of the parents are ordered to pay [emphasis is original]. Similarly, if both parents continue to provide care, as in shared physical custody cases, the court may find that the gross income available for child support payments of the parents is proportionately reduced, and that the obligation of one is set-off, all or in part, by the obligation of the other. For example, if parents provide monthly alternating residential care, and each parent has the same gross income, the court may find that no child support should be paid by either parent. If one of the parents had twice the other's earnings, the court could apply the standard to one-half that parent's earnings.[24]

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[24] Linda Reivitz. "Percentage of Income Standard for Setting Child Support Awards," memorandum by Secretary, Department of Health and Social Services,

The originally intended application of the guidelines closely resembled the theoretical underpinnings of Van der Gaag's estimated child cost percentages (regardless of whether the theoretical definition of child costs was correct). Under the legally allowed advisory capacity of the guidelines, proper application required appropriate consideration of taking into account (1) each parent's custodial time with the child and (2) each parent's share of combined income. Only after the guidelines were enacted into law as a rebuttable presumption were the original procedures forgotten—apparently as political maneuverings. Only after the guidelines were adopted second-hand by states such as Georgia were the original theoretical underpinnings forgotten—that true income shares child support guidelines require the taking into account of both parents' income and parenting time shares and only for low income situations or minimal benefit situations. The memorandum also called for judicial discretion to lower the presumptive percentages for higher incomes.

The Majority's Argument for Standard of Living Is an Argument for Income Shares

The Majority of this Commission argues that income shares should not be adopted because this method does not address maintaining the standard of living at about the same level for the child in both parents' household. First, courts traditionally have focused on needs of the child as well as typical expenditures on the child by the intact household when awarding child support, thereby reserving standard of living issues for alimony requests. Importantly, standard of living is an issue only if in the first instance the custodial parent has a substantially lower income than the non-custodial parent. The court cannot know this without a comparison of parent incomes. This requires some formula involving both incomes. Additionally, to argue the issue of standard of living, to be consistent the Majority must argue that if the non-custodial parent has a significantly lower income than the

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State of Wisconsin, to members of the Wisconsin Judiciary, December 20, 1983, *Improving Child Support Practice, Volume One*, The American Bar Association, 1986, pp. I-221.

custodial parent, then income should flow from the custodial parent to the non-custodial parent. At a minimum, acceptance of the standard of living standard for child support would include the belief that if a child has a right to a share of the non-custodial parent's income when in the custody of the custodial parent, then the child has an equal right to a share of the custodial parent's income when in the physical custody of the non-custodial parent. To be consistent, the Majority must argue for some form of income shares—the Majority must argue for change away from Georgia's percent-of-obligor-only income model.

Separately, as already discussed, Georgia's current guidelines in most situations lead to a higher standard of living for the custodial parent than the non-custodial parent on an after-tax, after child support basis. This certainly is true for cases such that the custodial parent has 25 to 35 percent less gross income than the non-custodial parent, depending on the income level of the non-custodial parent and on the number of children. It seems ludicrous for the Majority to raise a standard of living issue when in most circumstances the custodial parent has the higher standard of living based on payment of Georgia's current presumptive child support awards. Certainly there are cases when the custodial parent has a much lower gross income and in those situations, a request for alimony would be appropriate. It should be noted that it is not appropriate for the Majority to use statistics on national standards of living when it is Georgia guidelines and standards of living that are at issue.

The State's Noncompliance with the Federal Requirement for a Case Study

From 45 CFR 302.56(h):

> As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

The intent of this requirement is that data on economic costs and data on child support awards from case studies be evaluated in a meaningful statistical manner to make sure that guidelines reflect actual costs and that court practices reflect that. If court practices of actual case situations result in a significant number of deviations, then the guidelines should be changed to reflect court experience with actual costs. To meet the intent of this requirement, there must be a comparison of actual case data on child support awards with presumptive awards and statistical analysis to evaluate if any differences between the two are statistically significant.

The Majority believes that the State has complied with the requirement for a case study to evaluate application of and deviations from presumptive guideline awards. The Majority believes that a survey of attorneys regarding their opinions on the application of Georgia's child support guidelines satisfies this Federal requirement. The survey—attached with the Minority Report as Appendix matter—was sent to attorneys with the Georgia Bar Association who attended a Georgia Bar Association meeting over the 1998 Memorial Day weekend at a luxury resort on Amelia Island, Florida. The number of respondents—those indicating that they had experience applying Georgia's presumptive child support guidelines in actual cases—was 72. The Commission also heard expert testimony from one Georgia Superior Court judge, Judge Alton J. Dempsey, Jr., and received a written report from another, Judge Martha Christian of Bibb County Superior Court, regarding their opinion on how well the guidelines are working. Finally, the Commission heard testimony from about four Title IV-D agency attorneys also regarding their opinion on how well the guidelines are working. These surveys of opinion are believed by the Majority to satisfy this Federal requirement for an evaluation of case studies.

Attorney Survey Not a Valid Case Study for Multiple Reasons

The Minority finds that these surveys of opinion do not satisfy the Federal requirement in 45 CFR 302.56(h) in several respects. The survey is a survey of opinion and is not a compilation of data on actual child support awards. Opinions cannot be compared to actual awards for necessary statistical analysis of whether actual

awards are deviating from presumptive amounts. The sample is not representative—the respondents were selected from a sample of attorneys attending a conference (on a self-selected basis) sponsored by the Georgia Bar Association at a luxury resort on Amelia Island, Florida. This is not a representative sample of Georgia attorneys, much less a representative sample of cases before Georgia courts. A sample of 72 respondents is not statistically significant. Two of the three economic experts appearing before the commission, Dr. Robert Williams and Don Bieniewicz, indicated that such a survey was not adequate to meet Federal requirements. These two noted that for actual case studies, at least 500 to 600 cases would be needed to be statistically meaningful. The remaining economic expert, Joan Entmacher, did not address the issue.

Judges Testify That Deviations Occur to Notable Extent

The issue of to what degree child support awards deviate from the presumptive level is one that this Commission is required to evaluate. The Majority appears to rely is part on testimony by Judge Alton J. Dempsey, Jr. and Judge Martha Christian to expand its survey panel for this purpose. Yet, Judge Dempsey specifically stated that he regularly deviates from the guidelines. Additionally, Judge Christian stated that juries regularly deviate from the guidelines in modification hearings. Testimony from the only two judges to testify before the Commission indicates that deviations occur to a sufficient degree that a casual review is insufficient to address the required cases study issue. Essentially, testimony before the Commission from judges—limited as it is—indicates that the Commission should make a recommendation that the guidelines be changed to fall in line with deviations such that the presumptive award tends to have limited deviations.

The Majority also believe that the one public hearing added to the Commission's review of application of the guidelines. However, the number of those appearing and those sending in letters only totaled roughly 40. The sample was self-selected, primarily from metropolitan Atlanta, and was not known to be representative of the state nor various socioeconomic backgrounds. Nor did the Commission engage in any type of statistical analysis of the opinion expressed. There was essentially

no verified case data presented by the public for the Commission to analyze as also held for testimony by judges and attorneys.

Errors in Majority Findings from the Attorney Survey

Regardless of these shortcomings, the Majority attempts to interpret the survey results from Amelia Island, some of the interpretations being questionable or biased by the wording of a few of the survey questions. The survey, part of Appendix material, asked selected attorneys attending the conference (among other questions) how well the presumptive child support awards provided for children and also asked if the guidelines were fair to both parents. The answers were broken down between "high," "about right," and "low" and were asked separately for three income ranges, $0 to $30,000; $30,000 to $75,000; and over $75,000. Few economists would argue that guidelines at low income levels are excessive for providing for children because before divorce, income was scarce relative to needs and was even scarcer as two-household costs rose. The survey answers reflected that difficulty. However, the $30,000 to $75,000 income range is very broad. An "about right" answer might be correct for $35,000 but for $55,000 "high" might be more appropriate, yet both are clumped together in the question. This likely biased some answers toward "about right." Furthermore, lumping the question of fair for "both" parents is puzzling. A "high" situation for an obligor might not be a "high" situation for the obligee. This may have invalidated some answers. What may be indicative of such a problem is that at least one respondent stated, "Hard to answer this unless we know CP's income." Additionally raising this question of invalid answers is a comparison of the number of respondents finding the guideline award "low" in terms of fairness to both parents. For the $30,000 to $75,000 range, only 1 of 72 respondents said the guidelines were "low." Oddly, for the over $75,000 range, 18 of 72 respondents said the guidelines were "low." It is not clear what the respondents meant since the guidelines are not defined beyond $75,000.

Attorneys Favor Changing the Guidelines

One issue was quite clear from the Amelia Island survey of Georgia Bar attorneys. Importantly, the vast majority of attorneys

surveyed were in favor of changing the guidelines. Simplicity of the current system was not a sufficient argument for them to answer than they desire to retain it. Out of 72 respondents, 45 said the guidelines should be changed and 11 said they didn't know. Only 15 respondents indicated they preferred to keep Georgia's guidelines in their current form. Many complained that the guidelines need to take into account the custodial parent's income, are too high in many circumstances, and need to take account for multiple families.

Georgia's Current Child Support Guidelines Still Conflict with Federal Recommendations and Georgia's Guidelines Still Are Bad Public Policy

The Federal government, in developing the practices and policies, which led to the Family Support Act of 1988, had established the national "Advisory Panel on Child Support Guidelines". The U.S. Office of Child Support Enforcement In 1984 at the request of the House Ways and Means Committee established this Advisory Panel. The Advisory Panel published a manual - "Development of Guidelines for Child Support Orders" - that was to be used by state child support commissions in the development of their guidelines. The Panel adopted eight principles by which states should development their own child support guidelines. The panel reviewed three types of guideline models, recommending for two and against the third because that third violated almost all principles that should underlie the guidelines. The Panel recommended against using the percent-of-obligor-income-only model—the model that Georgia chose and continues to use.

The Federal "Advisory Panel" adopted eight (8) general principles - which they (the Panel) recommended that states follow in their development of guidelines. Those principles are:

1) *Both parents share legal responsibility for supporting their children. The economic responsibility should be divided in proportion to their available income.*

2) *The subsistence needs of each parent should be taken into account in setting child support, but in virtually no event should the child support obligation be set at zero.*

3) *Child support must cover a child's basic needs as a first priority, but to the extent either parent enjoys a higher than subsistence level standard of living, the child is entitled to share the benefit of that improved standard.*

4) *Each child of a given parent has an equal right to share in that parent's income, subject to factors such as age of the child income of each parent; income of current spouses, and the presence of other dependents.*

5) *Each child is entitled to determination of support without respect to the marital status of the parents at the time of the child's birth. Consequently, any guideline should be equally applicable to determining child support related to paternity determinations, separations, and divorces.*

6) *Application of a guideline should be sexually non-discriminatory. Specifically, it should be applied without regard to the gender of the custodial parent.*

7) *A guideline should not create extraneous negative effects on the major life decisions of either parent. In particular, the guideline should avoid creating economic disincentives for remarriage or labor force participation.*

8) *A guideline should encourage the involvement of both parents in the child's upbringing. It should take into account the financial support provided directly by parents in shared physical custody or extended visitation arrangements, recognizing that even a fifty- percent sharing of physical custody does not necessarily obviate the child support obligation.*[25]

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[25] Williams, Robert G., Ph.D.- Economics. 1987. *Development of Guidelines for Child Support Orders*, a manual published under grant to the National Center for State Courts for use by state child support commissions and legislative bodies.

The Federal manual published by the Advisory Panel describes the "Percentage of Gross Income" model - adopted by Georgia - as **"simple, but inequitable"**. The Federal Advisory Panel recommended that states adopt either the Income Shares model or the Delaware-Melson formula as the basis for their child support guidelines for the following reasons:

The Income Shares Model was developed, as an approach that is consistent with the best available economic evidence on child-rearing expenditures. It is also designed specifically to be consistent with the basic principles for child support guidelines specified by the federal Advisory Panel. The Delaware-Melson Formula defines levels of basic, or subsistence, needs for the parents and children. It provides that parents are entitled to support themselves at a basic level before having the formula applied.

At best, Georgia's guidelines meet only numbers 5 and 6 of the Panel's principles—those of applying equally for children regardless of parents' marital status and being gender neutral. Even meeting these criteria is suspect in actual application by Georgia courts. Notably, non-custodial mothers generally are ordered to pay less child support than non-custodial fathers in similar circumstances.

By continuing to use the guidelines the Federal Panel recommended against, Georgia engages in bad public policy with adverse consequences for children and families.

- Georgia's guidelines are excessive and well above child costs at moderately high and high income levels.
- Georgia's guidelines turn children of divorce into a financial prize—one to be fought over in a winner-take-all situation where sole custody is the hallmark of Georgia courts.
- Sole custody and hidden alimony aspects of Georgia's guidelines create the incentive for custodial parents—generally mothers—to keep the children out of their father's

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Washington, D.C.: U.S. Department of Health and Human Services, Office of Child Support Enforcement.

life as much as possible so as to not risk losing the bonus money associated with winning custody and child support.

- This State-encouraged behavior by custodial parents—primarily mothers—has led to extensive social problems such as more crime in single-parent dominant neighborhoods (men are not around to discourage crime nor are around to help discipline children) and children do not do as well in school as when fathers are more involved.

- Georgia's guidelines are burdensome to low-income obligors although presumptive awards at the low-income level are inadequate for covering child costs. Yet low-income obligors cannot meet their own subsistence needs but are burdened with child support they cannot pay.

- Low-income and moderately low-income obligors are driven into an underground cash economy by excessive child support burdens combined with automatic income deduction orders through employers. When income deduction orders are implemented, low-income obligors must quit their job and work for cash just to survive. This deprives obligors of a decent career path, puts them in a situation where they cannot pay mandated child support, leaves them in arrears and under threat of arrest for contempt if they show up to visit their children.

- Georgia's presumptive guidelines drives low income obligor fathers underground and those suffering the most are children and fathers who wish they could spend time together but cannot because of an inflexible child support system.

Cruel to Non-custodial Parents and Georgia's Guidelines at Risk in U.S. District Court: Impact of Deadbeat Parents Act of 1998

Recent enactment of Federal legislation make change in Georgia's child support guidelines an urgent priority. On June 24, 1998, President Clinton signed into law the Deadbeat Parents Punishment Act of 1998, which creates Federal felony penalties for owing child support arrears. Under this new statute, felony

punishment would apply if the amount owed by an obligor of child support was $5,000 or more and the payments were more than a year delinquent and were based on willful nonpayment. Out-of-state parents owing $10,000 or more or who fail to pay for two years could also face up to two years in prison. Parents also could face fines and would be responsible for making restitution for unpaid child support. Under the bill, the state court findings would be presumed to be correct.

The problem is that Georgia's guidelines are excessive and most non-custodial parents who are behind in support payments are delinquent because they can't pay not because they won't pay. The law would also apply to situations in which a father is ordered to pay years of back support for a child he for years was not told existed. Yet, Georgia courts are notorious for refusing to acknowledge that Georgia's guidelines are excessive and regularly find delinquent obligors guilty of contempt when they should not be doing so. These regular awards of excessive child support and unjustified findings of contempt would carry over as presumptions in Federal court. Georgia judges are reluctant because of either ignorance or political pressure and do not deviate from the guidelines as frequently as they should and, in turn, are setting the stage for creating Federal felons out of non-custodial parents for no reason other than the fact that they are non-custodial parents.

Finally, since any Federal district court can potentially enforce Georgia's child support guidelines under the above circumstances (as now do other states' state courts in broader circumstances) this is an additional venue in which Georgia's guidelines could be challenged as a violation of equal protection under the U.S. Constitution. This new Federal law is one more reason that Georgia's child support guidelines should be brought in line with economic reality.

[Bibliography omitted]

REPORT TO THE GOVERNOR FROM THE GEORGIA COMMISSION ON CHILD SUPPORT

The Georgia Commission on Child Support was created by Executive Order of the Governor, dated May 8, 2001, for a term ending July 1, 2001. Pursuant to 42 U.S.C. 667 and 45 C.F.R. 303.56, a state must review child support guidelines every four years. This Commission was charged with the responsibility of studying current guidelines and offering recommendations to the Governor. (See Appendices 1, 2, 3.)

Meetings were held weekly over the course of the six weeks. Testimony was taken from individuals during two public hearings in Atlanta and Tifton. Letters from citizens were received and reviewed. Many writings, reports, journal articles, and presentation material were obtained and considered by the Commission. A survey was sent to all Superior Court judges, Juvenile Court judges, and Office of State Administrative Hearings administrative law judges. Additionally, surveys were sent to members of the Family Law Section of the State Bar of Georgia attending the annual meeting, IV-D attorneys, and Legal Aid attorneys. The results of the survey are included as Appendix 6. (Also see Bibliography.)

Additionally, three expert witnesses made presentations. These experts offered to the Commission diverse opinions and views as they relate to the construct and purpose of a child support guideline. The models discussed included: Cost Shares; the American Law Institute model; the Tennessee Percentage of Net Income model and the Income Shares. model. Text of each model is incorporated in this report and available under separate cover in the bibliography.

In "A Guide to the Evaluation of the Georgia Child Support Guidelines – O.C.G.A. §19-6-15", (See Appendix 4.) the Commission prepared a three pronged blueprint for the evaluation of guidelines, as well as several critical questions to be addressed.

The first point related to determination of an economic standard, i.e. what are the economic assumptions that underpin the chosen guideline. A second part of the test involves the balancing of interests. This is a political-societal component that is largely responsible for the variations in guidelines between the states. The final test of the guideline reflects a determination of whether the guideline can easily be applied without the need for constant variation, and therefore encourages settlement.

A sample of the questions the Commission deliberated included:

Does the application of the Georgia Guidelines result in an award of support that reflects the "cost of raising a child?" Is the result within the general range as defined by the economic standards commonly used?

The Commission determined that the present guidelines were generally appropriate and reflective of the "costs of raising a child".

What economic standard should be used in making this determination?

Poverty Threshold Data – or Poverty plus a percentage?
Bureau of Labor Statistics (BLS)
USDA Calculations
Other?

The Commission discussed this question at some length and ultimately determined from the materials provided by the experts, and the economic data available including the above standards, that the Georgia guidelines are generally consistent with the mainstream economic standards.

How well does the application of the Georgia Guidelines safeguard the following interests?

The child's interest in having sufficient resources to grow and thrive.

The obligee's interest in having the means to raise a child at a suitable standard of living.

The obligor's interest in providing for the child's needs while preserving a suitable standard of living for the obligor.

Society's interest in not having a child become a dependent of the state.

The Georgia guidelines provide the flexibility needed to accommodate the interests of all parties including the societal interest. The high-income (above $75,000 per annum income) reason for a possible variation may need to be reviewed given the effects of time, inflation, the progressive income tax, and the general increase in incomes. Also some concern was expressed related to the absence of a low income set aside for the obligor.

How do the Georgia Guidelines compare to other state models?

Generally the results obtained by the Georgia guidelines tracked that of other popular guidelines. (See Appendix 5.) The comparative charts diverge at the higher incomes and at the extreme low incomes.

What, if anything, did the Public Hearings reveal as to the deficiencies in the application of the guidelines?

In general, the public hearings were inconclusive in showing a need for a change in the guidelines. Those who testified expressed serious concerns about the child support system, the distribution of child support, and the way the Georgia guidelines addressed the needs of second families. From the testimony the Commission gleaned the need for additional information to determine if the enumerated reasons for varying from the established support ranges are being used properly.

What did the surveys sent to the judiciary and family law attorneys reveal?

The family law attorneys and the judiciary generally support the guidelines. There is agreement among the majority of the

respondents that the guidelines work best when applied to middle income families. However, the attorneys and judges agreed to the adequacy of the guidelines and the majority did not seek substantive changes. (See Appendix 6)

Is there reason to believe that the guidelines are not being applied equally?

The one area of concern is the policy of the Office of Child Support Enforcement, as it relates to multiple households and the determination of support for those households. The policy appears to be in conflict with a Georgia Supreme Court opinion – *Ehlers v. Ehlers*, 264 Ga. 668 (1994).

As a general conclusion, the Commission members determined that the Georgia Child Support Guidelines as, embodied in O.C.G.A. § 19-6-15, result in child support awards that are generally appropriate, to the extent that they provided basic subsistence for children, and that they were adequate, given the resources of the parents." Having set this as the baseline, the Commission members make the following specific recommendations:

The Georgia Child Support Guidelines as embodied in O.C.G.A. § 19-6-15, results in child support awards that are generally appropriate, to the extent that they provided basic subsistence for children, and that they were adequate, given the resources of the parents.

That the Governor be asked to empower a statewide continuing child support task force to investigate and report on all aspects and issues surrounding child support, including but not limited to:

> How child support is set.
>
> What are the problems, if any in the present methodology and system.
>
> How child support payments are received and transferred to the obligee.
>
> The application and implementation of the guidelines.

Recommend to the Governor that a statute be enacted addressing the case disposition form to include relative variance information, and that the information be studied.

The statutory guidelines need to be amended to clearly require that support orders specify a dollar amount of support and not indicate support to be paid as a "percentage of income", and should be applied prospectively.

In light of the divergent points of view embodied in the membership, the Commission chose to provide both recommendations and suggestions for future study.

The Commission members agonized over some issues that could not be decided in the limited time frame. Because of the time constraint the suggestions provided are necessarily left for future study. Many of the members were interested in the Governor forming a continuing task force to study those issues, which could not be addressed or agreed upon, and in fact made such a recommendation.

In addition, the Commission offers the following suggestions. These suggestions were the subject of much discussion and deliberation and embody the range of positions and concerns held by various members. The deliberations of the Commission led to the conclusion that there is a need for one or more systematic studies to be conducted prior to the next Commission related to the following areas:

> The need for and effect of a low-income reserve, or other form of special treatment for the low-income obligor. How will a low-income reserve, or other special treatment affect the parties, particularly the children?
>
> The application of the guidelines for high-income obligors. Does the present Georgia guideline protect the interests of the parties?
>
> The application of the guidelines when there are multiple/successive households. Too often, there is not enough money to meet the support needs of all the children

in all the families involved. What formula should be applied to determine the child support obligation in all households?

The obligee's income is not explicitly factored into the guidelines. Should the state consider a change to an income shares type model as a remedy?

The present guideline provides for a numerical range based on a percentage of gross income. Should the guideline ranges be eliminated or narrowed?

The Georgia statutory guideline is based on a percentage of gross income. If Georgia changed to a net income percentage, what are the implications and ramifications for existing orders?

Study the prior Commission recommendations that children in high-income socio-economic groups be awarded more than marginal support, without trying to legislate a requirement that the child enjoy the prior standard of living.

Other areas that need to be studied systematically include: The need for variances for special medical and educational needs; the inclusion of both health insurance and childcare as a variance; and the inclusion of shared custody considerations.

The members of the Georgia Commission on Child Support wish to thank the Governor for the opportunity to serve the children of Georgia. The Commission provided a forum to study and debate the issues of child support and the effect these issues have on so many of the citizens of this state.

On behalf of the members of the Georgia Commission on Child Support, this report is submitted along with all supporting documents for your consideration.

With my best regards,
/s/
Justice Carol W. Hunstein
Chair of the 2001 Georgia Commission on Child Support

cc: Commission Members

[Appendices, except Appendix 4, omitted]

APPENDIX 4

Georgia Guideline Commission
June 15, 2001

"A Guide to the Evaluation of the Georgia Guideline - O.C.G.A. 19-6-15"

The evaluation of a "Guideline" is at least three pronged. The first test involves an economic determination." What is the standard that will be used to determine the financial support - the cost of raising a child? Because states start from different economic assumptions, the guideline results, even when the methodology is the same, vary, sometimes substantially. It may be fair to reason that if a guideline result comes within the general range of possible answers, based on any of the economic assumptions, then it is acceptable.

The second prong involves the balancing of the interests. This is the political/societal component and perhaps best explains the wide variations in guidelines state-to-state. Even if the mechanics of the methodology are the same, the societal interests flavor the way the competing interests are balanced. Some formulae make this a matter for formulaic calculation. Other guidelines define this as a reason for varying from the guideline; this is Georgia's way.

And finally, the "guideline" must be used and appropriate without deviation for most cases. This is the practicality test. In practice, does the state's "guideline" work without the need for variation in most cases. Doe the "guideline encourage settlement?

45 CFR 302.56 Guidelines for setting child support awards (h) reads:

> A State must consider economic data on the cost of raising children and analyze case data gathered through sampling or

other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

A Sample of Critical Questions:

Does the application of the Georgia Guidelines result in an award of support that reflects the "cost of raising a child?" Is the result within the general range as defined by the economic standards commonly used?

What is the economic standard used to make this determination?
Poverty Threshold Data - base at what percentage?
Bureau of Labor Statistics Household Equivalence Scale
USDA calculations
Other

How well does the application of the Georgia Guideline safeguard (balance and harmonize) the following interests?

- The child's interest in having sufficient resources to grow and thrive.
- The custodial parents interest in having the means to raise a child at a suitable standard of living
- The non-custodial parent's interest in providing for the child's needs, without discouraging employment by the custodial parent or depriving non-custodial parent of the benefits of increase income
- Society's interest in not having a child become a dependent of the state.

What, if any, are the deficiencies of the Georgia Guidelines as revealed by an analysis of the "various costs of raising a child?" Or, how does the Georgia Guideline stack up with the other more widely used methodologies - income shares, cost sharing, income sharing...?

What, if anything, did the Public Hearings reveal in the way of deficiencies in the application of the Guidelines? Are the deficiencies related to the guideline law or the [sic] its application?

What, if any, deficiencies of the Georgia Guidelines were revealed by the surveys of the BAR and Judiciary?

Based on the public testimony, personal experience if such is applicable, and the results of the survey - is there reason to be concerned that the variations from the "Guideline" occur in more than a "limited" number of cases?

Based on the discussions-to-date, the background materials provided, the result of the surveys, public testimony and the testimony of experts as of this date, what recommendations need to be considered by the Commission?

EXAMPLE CASES CHALLENGING STATE GUIDELINES

Alabama
Elliott v. Williams,
631 So.2d 1020 (1993). (guidelines upheld)

Alaska
Coghill v. Coghill,
836 P.2d 921 (1992). (guidelines upheld)

Arizona
Schenek v. Schenek,
780 P.2d 413 (1989). (guidelines upheld)

Arkansas
Stewart v. Winfrey,
824 S.W.2d 373 (1992). (guidelines upheld)

Colorado
Stillman v. State,
87 P.3d 200 (Colo. 2003), *cert. denied*. No. 035C761, 2004 Colo. LEXIS 176 (Colo. March 22, 2004). (guidelines upheld)

Connecticut
Vickery v. Vickery,
595 A.2d 905 (1991). (guidelines upheld)

Delaware
Smith v. Francisco,
737 A.2d 1000 (1999). (guidelines upheld)

Dalton v. Clanton,
559 A.2d 1197 (1989). (guidelines upheld)

District of Columbia
Fitzgerald v. Fitzgerald,
566 A.2d 719 (1989), *petition for rehearing denied*, 575 A.2d 270 (D.C. 1990) (guidelines invalidated)

A.S. v. District of Columbia ex rel. B.R.,
593 A.2d 646 (1991). (guidelines upheld)

Georgia
Keck v. Harris,
594 S.E.2d 367 (2004). (guidelines upheld)

Ward v. McFall,
593 S.E.2d 340 (2004), *cert. applied for*. (guidelines upheld)

Georgia Dept. of Human Resources v. Sweat,
580 S.E.2d 206 (2003), *cert. denied*, ___ U.S. ___, 124 S.Ct. 432 (2003). (guidelines upheld)

Hawaii
Child Support Enforcement Agency v. Doe,
No. 25397, 2004 Hawaii LEXIS 124, April 28, 2004, *cert. denied*, No. 25397, 2004 Haw. LEXIS 385 (June 7, 2004). (guidelines upheld)

Indiana
Garrod v. Garrod,
590 N.E.2d 163 (1992), *rehearing denied* Jun 3, 1992, *appeal after remand*, 640 N.E.2d 450 (Ind. Ct. App. 1994), *and superseded by* 655 N.E.2d 336 (Ind. 1995). (guidelines upheld)

Gielsdorf-Aliah v. Aliah,
560 N.E.2d 1275 (1990). (guidelines upheld)

Iowa
In re Marriage of Rudish,
472 N.W.2d 276 (Iowa, 1991). (guidelines upheld)

Missouri
Lewis v. Department of Social Services,
61 S.W.3d 248 (2001). (guidelines upheld)

New Mexico
Garner v. Garner,
Memorandum Opnion No. 23, 761 (N.M. App. 2003) *cert. denied*, No. 3/28127 (N.M. 2003), *and petition for cert. filed*. (guidelines upheld)

New York
Cuthbert S. v. Linda S.,
613 N.Y.S.2d 801 (1994). (guidelines upheld)

North Dakota
Nelson v. Nelson,
547 N.W.2d 741 (1996). (guidelines upheld)

Eklund v. Eklund,
538 N.W.2d 182 (1995). (guidelines upheld)

Illies v. Illies,
462 N.W.2d 878 (1990). (guidelines invalidated)

Oregon
Guthrie v. Support Enforcement Div., Dept. of Justice,
823 P.2d 1033 (1992), *reconsidered, opinion adhered to*, 828 P.2d 1043 (Ore. App. 1992), *and review denied*, 835 P.2d 916 (Or. 1992). (guidelines upheld)

Pennsylvania
Lampa v. Lampa,
537 A.2d 350 (1988). (guidelines upheld)

Szillery v. Wheaton,
555 A.2d 237 (1989). (guidelines upheld)

South Dakota
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434 N.W.2d 590 (1989). (guidelines upheld)

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